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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1914

JOSEPH P. ASPER, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.

HONORABLE PAGE MORRIS,
Presiding Judge.

T. E. LATCHER,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error.

NO. 663

IN THE

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OF THE UNITED STATES

OCTOBER TERM, 1917

JOSEPH F. ARVER, Plaintiff in Error
VS.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
HONORABLE PAGE MORRIS,
Presiding Judge.

T. E. LATIMER,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error.

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No. 363

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH F. ARVER, Plaintiff in Error
vs.
UNITED STATES OF AMERICA, Defendant in Error.

STATEMENT.

The Plaintiff in Error was tried and convicted at the June A. D., 1917, Term of the United States District Court for the District of Minnesota, Third Division, of violation of Section Five of the Act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

The Indictment contains one count charging the plaintiff in error did wrongfully and unlawfully, wilfully fail and refuse to register, and present himself for registration as required by said Act, Proclamation and Regulations.

A demurrer was filed to said indictment in which plaintiff in error demurred upon the following grounds, to-wit:—1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the Thirteenth Amendment of the Constitutionn of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section One of Article One, and Section Eight of Article One, of the Constitution of the United States of America, and therefore null and void.

This demurrer was overruled and the plaintiff in error duly excepted thereto, whereupon the case was set for trial July 2d, 1917, at which time he was tried, the jury returned a verdict of "guilty", and the plaintiff in error was sentenced by the Court to serve one year in the Minnesota State Reformatory.

SPECIFICATIONS OF ERROR.

The District Court of the United States for the District of Minnesota erred in overruling the demurrer of defendant.

BRIEF.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are

in conflict with the terms and provisions of Section 8, Article 1, of the Constitution of the United States.

Rhode Island vs. Massachusetts 12 Peters 657

Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

Martin vs. Hunter 1 Wheaton 304

3 Annals of 13th Congress 807

Kneedler vs. Lane 45 Pa. 238

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations perscribed thereunder is in conflict with the terms and provisions of the 13th amendment of the Constitution of the United States which prohibits involuntary servitude.

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 3

Plessy vs. Fergurson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 276

Clyatt vs. U. S. 197 U. S. 207

Hodges vs. U. S. 203 U. S. 1

Baily vs Alabama 219 U. S. 219

Butler vs. Perry 240 U. S. 328

U. S. vs. Sanges 48 Fed. 78

State vs. West 42 Minn. 47

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1, and Section 8, Article 1, of the Constitution of the United States in that congress attempts to delegate legislative power to the President of the

U. S. and other United States or state officials.

Stoutenburg vs. Henniek 129 U. S. 141
Field vs. Clark 143 U. S. 649, 692
U. S. vs. Blasingame 146 Fed. 654
U. S. vs. Keokuk etc. Bridge Co. 45 Fed. 178
Cooley, Constitutional Limitations Chap 5 P 137
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10 Opinions Atty. Gen. of U. S. 413
Bryce, American Commonwealth P 165
Wilson, Constitutional Government P 57, 58, 59
Webster's Works
The Federalist Chap. 69 P. 515

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4, Article 4, of the Constitution of the United States, and Article 10 of Amendments to the Constitution of the United States in that Congress attempts to require state officials to do that which is prohibited to the States themselves.

Collector vs. Day 1 Wallace 124, 126
McCulloch vs. Maryland 4 Wheaton 405
Dred Scott vs. Sanford 19 Howard 401
Worcester vs. Georgia 6 Peters 570
Kohl vs. U. S. 91 U. S. 372
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Martin et al vs. the Lessee of Waddell 16 Peters 410, 416

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Article V of Amendments to the Constitution of the United States providing that "nor shall any person be deprived of his life, liberty or property without due process of law."

In re Debs 158 U. S. 594

Boyd vs. U. S. 116 U. S. 635

Gulf Colo. & Santa Fe Ry. vs. Ellis 165 U. S. 154

Fairbanks vs. U. S. 181 U. S. 301

ARGUMENT.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of paragraphs 12 & 14 of Section 8, Article 1 of the Constitution of the United States in that Congress is attempting to raise an army by conscription.

In arriving at a proper interpretation of various sections of the Constitution this Court has had recourse in the past to an inquiry as to the state of things existing at the time of the adoption of the Constitution, and also a search of the contemporary history of that time.

Rhode Island vs. Massachusetts 12 Peters 657

Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

At the time our Federal Constitution was adopted there were two kinds of military service recognized

in the English speaking world—the militia and the **standing army.**

In the days of the Saxon Kings the militia in England was organized by counties for defence of the realm. This organization survived the Norman conquest in similar form and for similar purpose. Stubb's Select Charters P 153, 154. But Wm. the Conqueror brought with him to England an army composed of feudal and mercenary soldiers and thus planted on English soil a new military organization known as the standing army.

There was great hostility in England toward this army which resulted in many attempts to reduce its size and cripple its strength. It was entirely disbanded during the rule of Cromwell, but again revised and enlarged, and used by the later Stuarts as well as the Tudors as a means or oppression. One of the grievances set forth in the Petition of Rights in 1628 was the oppressive use of the standing army by the King. Appendix Stubb's Select Charters.

This was later expressed in the Bill of Rights offered in Parliament in 1689. One of the accusations against the King being that of "raising and keeping a standing army within his Kingdom in time of peace, without the consent of Parliament, and quartering soldiers contrary to Law. Statute of Realm pp. 142, 145.

Notwithstanding their hatred of the standing army and hostility to its command by the King the fear of invasion from the continent impressed upon them the need for such a military force. This situation was met by Parliament passing the Mutiny Act of 1689 and an act for the restriction of the grant of

revenues. Thus the discipline of the army and the grant of its supplies were made entirely dependent upon the will of Parliament. Since that time the Parliament has renewed this statute annually.—Macy —The English Constitution P 335.

Attempts were made by the Tudor Kings to raise an army by conscription and later a similar attempt by the Stuarts but without success, and until the Revolution of 1688 the British army was composed of mercenary and feudal soldiers. After the Revolution of 1688 several attempts were made in Parliament to provide for the raising of an army by conscription, but the only act applying to conscription that was passed by Parliament before the adoption of our Federal Constitution was passed in 1704, and provided among other things to

> "levy and raise all able bodied, idle and disorderly persons, who can not, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their support and maintenance, to serve his majesty as a soldier."—The Statute 4 Ann Chapter 10.

Later acts of Parliament contained similar provisions, but all attempts to extend conscription to other persons failed.

Statute 29 George II Chapter 4 (1755) 30 George II Chapter 8 (1757) 18 George III Chapter 53 (1778) 19 George III Chapter 10 (1779).

From these facts it may be seen that only paupers and vagabonds could be conscripted into the standing army in England: that no person who could vote for members of Parliament could be conscripted, and to all intents and purposes the membership of

the British army was based upon voluntary service. This fact was emphasized during our War of the Revolution when the Whigs were opposed to the war and the English King was compelled to hire Hessians and others from the continent to make up the English forces fighting against the colonies.

That this feeling against standing armies prevailed in America at the time of the Constitutional Convention of 1787 and especially among the delegates to that Convention is shown by the provision in Section 8, Article 1 of the Constitution of the United States which provides "but no appropriation of money to that use shall be for longer time than two years". The opposition to the raising and control of an army by the president is shown by the provisions of that section which gives to Congress power" to make rules for the government and regulation of the land and naval forces"

That Congress has recognized that it was the intention of the authors of the Federal Constitution to provide for the raising of the Regular Army by volunteer enlistment is shown by one hundred and twenty-seven years of national legislation. During all that time the subject of raising an army by conscription has been discussed in Congress only twice—once in 1814 when a bill providing for the raising of an army by conscription was introduced in Congress at the request of the Secretary of War but failed of being enacted into law. Daniel Webster perhaps the greatest expounder of the Constitution, opposed this measure upon the ground that it was in contravention of the terms and provisions of the Constitution of the United States.

In opposing this measure he said,

"It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, for the general purposes of the war, under the color of a military service...

That measures of this nature should be debated at all, in the councils of a free government, is a cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form....

The administration asserts the right to fill the ranks of the Regular Army by compulsion. It contends that it may now take one out of every twenty-five men, and any part or whole of the rest, whenever its occasions require. Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defense or for invasion, according to the will and pleasures of the government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.

Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty?

Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious

and mischievous government may require it?

In granting Congress the power to raise armies the People have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the People themselves and they have granted no others. To talk about the unlimited power of the government over the means to execute its authority is to hold a language which is true only in regard to despotism. The tyranny of Arbitrary Government consists as much in its means as in its ends, and it would be a ridiculous and absurd constitution which should be less cautious to grant against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction, a free government without adequate provisions for personal security is an absurdity, a free government with an uncontrolled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered into the head of man."

Van Tyne, The Letters of Daniel Webster.

The question of raising an Army by conscription was again discussed by Congress in 1863 and a Conscription Act was passed by both Houses of Congress and signed by the President. 12 U. S. Statutes at Large 731.

The question of the constitutionality of this act was not determined by the Federal Courts. The only case before the courts in which the constitutionality of this act was considered and determined was in the State Court of Pennsylvania. In the case of Kneedler vs. Lane et al 45 Pa. St. 238 an injunction was sought against the officials entrusted with the duty of enrolling drafted men, to restrain them from

enrolling men in the drafted army on the ground that the Act was null and void and in violation of the provisions of the Constitution of the United States. The Court granted a preliminary injunction by a vote of three to two holding the Act unconstitutional. Later a new judge having been elected and qualified, this position of the Court was reversed and the Constitutionality of the Act upheld. Elaborate opinions were rendered by individual judges and some of the conclusions appear pertinent at the present time. Chief Justice Lowrie urged that if Congress had the right to raise an Army by conscription that this would subject all social, civil and military organizations of the States to the Federal power of raising armies and that nothing would be left that had any constitutional right to stand before the will of the Federal Government. Kneedler vs. Lane Supra pp. 246.

Another fact that was emphasized is that in all cases of forced contribution to the National Government allowed by the Constitution, such as duties, imposts, excises and direct taxes there was fixed the rule of uniformity, equality or proportion. That nowhere in the Federal Constitution is there any reference to forced contribution to the Army or any rules for such contribution as is provided in all other such cases. Kneedler vs. Lane Supra 242.

Judge Woodward calls attention to the fact that a careful study of the Constitution itself shows that there is no intention to authorize the raising of an Army by conscription and sets forth the 16th and 17th paragraphs of Section 8, Article 1 of the Federal Constitution in support of his contention. Kneedler

vs. Lane Supra pp. 256-257.

By the Act of Congress approved May 18, 1917, the first paragraph of Section 1, authorizes the President to raise and organize — — — such a number of increments of the regular army provided by the National Defense Act approved June 3, 1916, or such part thereof as he may deem necessary. This National Defense Act provides that

> "the army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now, or may hereafter be, authorized by the law."

Section 2 of said National Defense Act provides that the regular army shall consist of officers and enlisted men. Section 27 of such act provides that after November 1st, 1916 all enlistments in the regular army shall be for a term of seven years. Section 57 of said Act determines the composition of the Militia as follows:

> "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia."

Sections 69, 70 and 71 of said act provides for enlistment in the National Guard as follows:

> "Section 69—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three

years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Section 70:—Federal Enlistment Contract:—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligations the enlisted man shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this....day of..... 19...., as a soldier in the National Guard of the United States and of the State of....., for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of....., and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of....., and of the officers appointed over me according to law and the rules and articles of war."

"Section 71. Hereafter all men enlisting for service in the National Guard shall sign an en

listment contract and take and subscribe to the oath prescribed in the preceding section of this Act."

However, Section 2 of the Act of May 18, 1917 provides:

> That the enlisted men required to raise and maintain the organization of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and wherever the President decides that they can not effectually be so raised or maintained, then by selective draft."

Thus, for the first time in the history of this nation Congress attempts to provide for the raising of a regular army, an organization based upon voluntary enlistment, by conscription. These drafted men are to be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions of Section 8, Article 1, of the Constitution of the United States which specifically reserves to the States the authority of training the militia and the appointment of officers.

The third paragraph of Section 1 of the Act of Congress adopted May 18, 1917 authorizes the President

> "to raise by draft as herein provided, organize and equip an additional force of 500,000 enlisted men, or such part or parts thereof, as he may deem necessary."

Section 2 of said Act provides that

> "all other forces hereby authorized except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training

cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act."

Section 5 of the same Act provides that

"all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act. Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

By these provisions men between the ages of twenty-one and thirty, not otherwise exempted, among them the plaintiff in error, are to be taken from the group that Congress has designated as unorganized Militia and placed in the Regular Army, National Guard and Drafted Army at the will of the President in violation of the provisions of the Federal Constitution which refer to the militia as follows:—

> "Congress has power — — — to provide for the calling forth of the militia to execute the laws of the Union, to suppress insurrections and repel invasions; to provide for the organizing, arming and disciplining of the militia, and for the governing of such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

By the provisions of the Act of May 18, 1917, the appointment of officers and the authority of training the militia are placed in the hands of Federal Authorities, thus taking away the rights of these members of the unorganized militia which is specifically granted them by the Constitution.

Furthermore, these men who are members of the unorganized militia are not called forth to execute the laws of the Union. Congress, the President, the War Department nor any other authority contends that this army is being called forth for this purpose. The civil authorities are well able to execute the laws of the Union. There has been no need for any portion of the National Military Forces to be called forth to suppress insurrections, either now existing or likely to exist in the future, and the emergency set forth in said Act does not refer to insurrections. Also there is no foreign foe on our soil who is to be repelled nor is there any body of foreign troops quartered in the vicinity of our soil from whom an invasion is imminent. The existing emergency referred to in the Preamble of said law and in the several sections thereof is not due to the inability of this Government to "execute the laws of the Union".

out the Militia to the three instances enumerated in

It may be pertinent to call attention to the fact that the "existing emergency" repeatedly referred to in the Act of May 18, 1917 grows out of a declaration of Congress that a state of war exists between this country and Germany and from said emergency there has developed no failure to execute laws, no insurrections and no invasions of our soil, but already a portion of the Regular Army of the United States is in France. Members of the National Guard are on the way to Eastern Ports of embarkation, cantonments have been built for the training and housing of the first drafted army, and preparations are being made for the call of the second drafted army, as provided in paragraph 4, Section 1, of the act of May 18,1917. Instead of being called forth to repel invasion, our military forces including the National Guard and the unorganized Militia are being ordered across the Atlantic Ocean, there to engage in warfare three thousand miles from our soil, and Congress has authorized the President to authorize the Governor to authorize the Mayor to authorize the Local Exemption Board to call forth this plaintiff in error, a member of the unorganized militia to engage in this warfare.

During the whole history of the English speaking people, no such power has been exercised by the national, Legislature or Executive except as applied to paupers and vagabonds, and the attempted usurpation of said power was one of the contributing causes of the downfall of the Stuarts.

It may be well to examine the status of the Military system of England from which was developed the Militia of the Colonies, the early States, and later of

the United States. From the earliest time the militia has existed in England as a local force for defense. Stubbs Select Charters pp. 163 and 164. By statutes of Edward III, Chapter 2, and 4 Henry IV Chapter 13 the members of militia could not be compelled to go out of their Shires; by Statute 25 Edward III Chapter 8, and 26, George III Chapter 107 the members of the militia could not be ordered out of their own country unless in case of urgent necessity certified to by Parliament, and could not be sent out of the Kingdom under any circumstances whatever. The last statute above mentioned was passed in 1786, only one year prior to the meeting of the Constitutional Convention in Philadelphia.

Mr. Dicey in the Law of the Constitution pp. 287-288 states that

> "the Militia is a Constitutional Force existing under the law of the land for the defense of the country—embodiment indeed converts the militia for the time being into a regular army, although an army which can not be required to serve abroad."

The members of the Constitutional Convention clearly recognized the English theory of a militia as a force for internal defense and definitely limited the power of Congress and the President over this military force as is shown by the provision in Section 8 of Article 1 of the Constitution, where the right of appointment of officers and the authority of training the militia is specifically reserved to the States and Congress was limited very definitely as to the conditions under which it could call for the militia. Furthermore, in Section 2, Article 2, of the Constitu

tion the control of the President over the militia as Commander in Chief was specifically limited to the time "when called into actual service of the United States". The attitude of the people of that time is shown by the fact that after all these safeguards were thrown about the Militia in the shape of limitations on Congress and the President it was considered necessary in order to protect the interests of the people to include in one of the first ten amendments to the Constitution, known as the Bill of Rights, Article 2 of the Amendments of the Constitution of the United States as follows:—"A well regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The intention of the authors of our Constitution and the attitude of the people at the time of its adoption is emphasized by an instance occuring at the Constitutional Convention. The Committee of Detail reported the clause authorizing Congress to provide for the calling forth of the militia and among other provisions included that of to "enforce treaties". Gouverneur Morris moved to alter this clause by striking out the words "enforce treaties" and this was adopted by a vote of the Delegates. Journal of Congress pp. 454-594.

If there could be any doubt in the minds of anyone regarding the intent of the members of the Constitutional Convention as to the power which the Constitution granted to Congress and the President over the militia, this act of striking out the provision giving the power to Congress to call forth the militia to enforce treaties placed the Convention clearly on

record as limiting the power of Congress in calling the Constitution, all of which are for service at home and within the boundaries of the Nation. In an early case Mr. Justice Story in discussing the rights of Congress over the militia stated:

> "It is almost too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in the clauses; and that in all other respects and for all other purposes, the militia is subject to the control of the government of the State authorities."—Houston vs. Moore 5 Wheaton 1, 51.

In 1912 during the administration of President Taft it appeared that an emergency might arise and a greatly increased number of troops might be needed and the question of calling forth the militia to be used in foreign warfare was seriously considered, and an opinion regarding the rights of Federal authorities to call forth the militia in such an emergency was taken up with the Attorney General of the United States and he was requested by the Secretary of War to give an opinion on the subject. In accordance with this request Attorney General Wickersham gave an elaborate opinion and among other things said:

> Sir: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:
>
> "Whether or not, under existing laws, the President has authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?"
>
> It is certain that it is only upon one or more

of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term "to repel invasion".

Then, too, "if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling invasion."

"What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsory executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

"So that when an armed force is used to compel the observance of treaty obligations or to punish or obtain compensation for their violation there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

"These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or its Territories. In the history of this

provision of the Constitution there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government was intended as a distinct limitation upon their employment.

"The militia of the States, restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties or to protect the rights of the government or its citizens in those cases in which protection must be sought beyond the territorial limits of the country."

"I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative."

This opinion was accepted by the President who was himself a jurist of ability and a careful student of the Constitution. This opinion of the Attorney General is binding upon the Executive Department of the Government and it has been recognized as correct by the present Executive administration. President Wilson in an address delivered in New York

City on January 27, 1916 said,

> "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our National defense should be built up and encouraged to the utmost; but you know, gentlemen, that under the Constitution of the United States the National Guard is under the direction of more than two score States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of actual invasion has the Presiden of the United States the right to ask those men to leave their respective States."

He later made similar addresses at Cleveland, Ohio on January 29, 1916, at Milwaukee, Wisconsin on January 31, 1916 and at Topeka, Kansas on February 2, 1916.

New York Times Jan. 30th, 1916, Feb. 1st, 1916, Feb. 3rd, 1916.

The Act of May 18th is a violation of the 13th Amendment of our Constitution reading as follows:—

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The 13th amendment has been construed by this court in nine cases that are pertinent here as follows:—

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 417

Plessy vs. Ferguson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 275
Clyatt vs. U. S. 197 U. S. 207
Hodges vs. U. S. 203 U. S. 1
Bailey vs Alabama 219 U. S. 219
Butler vs. Perry 240 U. S. 328

The application of this Constitutional provision to the case at bar involves the construction of the entire amendment, possibly the definition of the word slavery, and an interpretation and construction of the phrase involuntary servitude. We take up the last of these first as being the more important.

The phrase involuntary servitude simply means a condition or status of compulsory service the clearest applicable term to the service provided for in the law.

Century Dictionary—Revised and enlarged Edition Volume 8, Page 5519.

Oxford New English Dictionary—Servitude Vol. 8, Page 522.

Funk & Wagnall's Standard Dictionary—Servitude, Volume 8, Page 522.

Universal Dictionary of the English Language—Volume 4, Page 4213.

In the second and third of such authorities, Military and naval service are cited as examples of such service that existed in India and in England in the very early days.

Bouvier's Law Dictionary, Vol. 2, Servitude, 15th Edition.

Black's Law Dictionary, 2nd Ed. Page 656.

In State vs. West, 42 Minn. 47, Mr. Justice Mitchell says,

"There is nothing better settled than that en-

forced labor is involuntary servitude within the meaning of such constitutional provisions.

This court has defined it as a condition of compulsory service in the Clyatt case supra page 215 and the Bailey case supra page 243.

The Robertson case supra in effect admits that military and naval service are within the letter of the inhibition of the 43th amendment.

The amendment prescribes that the condition of compulsory service shall not EXIST in this land, and is clearly self-executing, and by the use of the word EXIST it places its inhibition on every individual, and on the National Government as well as the states.

As an inhibition on the national government Robertson vs. Baldwin supra in a case involving the constitutionality of a natonal law condemned for permitting involuntary servitude classes the amendment with the Bill of rights as a limitation on the power of the Federal Government. Harlan, Judge in the dissenting opinion thereto pages 292-3 so classes it, citing the opinion of Mr. Justice Miller in the Civil Rights cases supra at page 20, paragraphs two and three. See also dissenting opinion to that case at page 35, paragraph 2. To the same effect see numerous and clear expressions of the court in the Plessy, Clyatt and Bailey cases supra.

Also U. S. vs. Sanges 48 Fed. 78

Black on Constitutional Law, 2nd Ed. Page 461

McClain on Constitutional Law says,

> "Amendment XIII prohibiting slavery or involuntary servitude is applicable not only to the Federal Government, but also to state governments and to individuals as well."

We gather from the foregoing and urge here that thereby the inhibition condemns the practice of slavery, and involuntary servitude, whether the dominant one be either an individual, or the state or National governments, and as well condemns laws by such sovereignties permitting it or compelling it.

In support of this theory we wish to quote the late Justice Moody who as Attorney General ruled, Opinions A. G. Volume 25, Page 474, that the ordinance of the Panama Canal Commission amounting to an executive act of that department compelling laborers contracting with the commission for a term of service to complete their term would be involuntary servitude within the amendment. In short the executive department of the government cannot hold a person in at least that capacity in a condition of involuntary servitude.

Mr. Justice Moody says to the Secretary of War:—

> "I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you inform me that the executive committee of the Panama Commission desires me to formulate a series of rules and regulations the observance of which would enable that committee, in making contracts for the furnishing of labor, to avoid a condition of peonage under the authority of the United States. The word slavery as used in it is descriptive of the chattel slavery which once existed in this country. That any such condition would be established by any officer of the United States is so inconceivable that it need receive no attention. But the words involuntary servitude are much broader than slavery, and include within their meaning many forms of service which cannot properly be described as slavery."

On page 477 he says,

> "I have no hesitation in saying that any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude within the meaning of the Constitution."

On Page 481 he says,

> "I entertain no doubt that the condition described in this ordinance is that of involuntary servitude and not the less involuntary servitude because the contract of service in which the laborer submits to the conditions prescribed by the ordinance was entered into freely and voluntarily and under careful public supervision."

Further on page 482 he says,

> "In the employment of labor on the canal the utmost care should be taken to exclude the conditions which have been indicated as those of involuntary servitude or any other conditions of like effect and tendency. This care should be exercised not only in making the contracts to which the UNITED STATES IS A PARTY, but in scrutinizing the contracts, usages and practices between those who agree to furnish contract labor to the United States and the laborers themselves."

Thus we see that there is substantial authority to the effect that forms of slavery and involuntary servitude practiced by the National Government as a master and laws by it permitting or compelling the condition are unconstitutional. We think too, that the national feeling which forced the 13th amendment clearly shows this through the passage and repeal of various laws such as the various compulsory road laws, and the repeal of the seaman law in controversy in the Robertson case and others to like effect. In practically the only case going into the subject of the compulsory road laws cited in the Butler case supra,

and upon which is based that of Dasler vs. Kansas. the law was vehemently attacked as a minor, subtle entering wedge for the return of forms of slavery to the state, and the court said in passing on it, that we could deal with the more flagrant forms when we came to them. The road laws were accepted as means of organization only, because the service would have been cheerfully rendered without it, as it is in all states of the Union today.

A return to compulsory military service would be a distinct return to the principles of feudalism, and particularly and clearly to that form known as vassalage, denounced by Mr. Justice Field in his dissenting opinion in the Slaughter-House cases supra at Page 69, as within the amendment and in the same class with peonage, serfage, villeinage and etc. Vassalage is herein otherwise treated, but we think we ought to recall the caurt's attention here to the fact that the essence of it was compulsory military service to the King or Lord, in return for protection and tenure of land.

We find in Henry Wilson's Rise and Fall of the Slave Power in America, Volume 2, Page 60, that the southern states themselves sold slaves on the block at auction. And under such circumstances we have no doubt that the states themselves, through escheat or otherwise, held slaves as did the governments of ancient Greece and Rome. Does anybody doubt that the 13th Amendment inhibited such practices, and such practice by the National Government, as Justice Moody says.

The government may regulate the right to quit to such limited extent as does not en-

croach on the spirit of the prohibition protecting the laborer and soldier's liberty which will under ordinary conditions prevent a disorganization of the system. If the state could compel its citizens to labor on the canal, it could compel them to build another Appian way, and the Pyramids. It is true that under most any situation, such action by a government elected by the people is unthinkable, but no one can gainsay the fact that peculiar unsettled conditions among the electorate may produce a despotic government, in which case for at least two years, the Constitution is our only protection.

In Missouri the courts decided in In Re Thompson 117 Mo. 83 that a law authorizing Justice of the Peace to empower the sheriff to hire out vagrants for a period of six months for cash was held involuntary servitude within the 13th amendment. This well illustrates how our country's Constitution has developed and improved on the English Constitution as it was when ours was adopted as to involuntary public service, when compared to the compulsory service of vagrants only in the English army and navy of that time, herein otherwise noted. As otherwise shown compulsory military service generally, was unconstitutional in England at that time and for many years prior thereto.

Every evidence from the language of the amendment itself, and from a history of the character of the times, leads to the conclusion that it is to be contsrued in its broadest sense.

Mr. Justice Field in Slaughter-House cases supra page 90, says:

"Still it is evident that the language of the

> amendment is not used in any restrictive sense. It is universal in its application."

The use of the disjunctives "neither" and "nor" disassociate "slavery" and "involuntary servitude" and render them independent of each other.

The amendment in itself, says Mr. Justice Brown in Robertson vs. Baldwin supra, makes no distinction between public and private service. Would it not follow ordinarily that there was none intended?

The amendment itself makes one exception, that of compulsory service for crime. The inference is to be drawn that there were no others, and that if any were intended they would have been stated. Clearly above any others, no public servitude was intended to be excepted, as service for crime being a public servitude, in which the state is the dominant and the criminal the servient factor, is expressly excepted from its operation, leaving the inference that no others of that class were intended to be excepted. In plain words the only act of sovereignty in which compulsory service is permitted is service for crime.

2 Story on Constitutional Law, Section 1924 says

> "The 13th amendment forbids not merely the slavery known to our laws, but all kinds of involuntary servitude not imposed in punishment of a public offense.

If the government's theory and contention is coreet that all public service, or any compulsory service that the public wishes to impose, or has in the past imposed, is a general exception to the language of the amendment, then the only expressed exception is of no value whatever, and is to be treated as surplusage, and might as well have been eradicated

therefrom by the framers. This court in the past has not been given to such a construction. Under the exception in the language, the state may hold a man to compulsory service for crime.

The amendment in lieu of many other possible words and phrases to express a prohibition uses the drastic phrase and word "shall not exist", clearly making the provision self-executing, denouncing a condition or status, by whomsoever created or maintained, be it individual, corporation, state or Nation.

This court as jealously guards the many and inalienable rights of the people, as it has recently jealously upheld the plenary powers of the government.

The high pitch of the public nerves at the time the amendment was adopted, by reason of the war, the draft act and the riots incident thereto, and many like and subsidiary incidents, attest the mood of the public, and its desire and intent for sweeping changes in policy. The fact that the draft act directly preceded the 13th amendment, that it was clearly in the minds of the public, that it engendered terrific opposition, that such an act had theretofore been considered unconstitutional, and the fact that a constitutional amendment prohibiting involuntary servitude, would cover every form of compulsory service, including service to the public, and the legislature in voting on such an amendment would so construe it and believe they were covering this class of service as well as any other, is added reason to give effect to their votes. Today if we were to prohibit by another amendment just such service, we could use no better language considering the broad general language in such instruments than

to repeat the language of the 13th amendment as it now is.

It seems to us that conscription was so clearly in the mind of the public and all bodies proposing or voting on the instrument, that had they intended to make an exception of compulsory military service, they would have done so in the amendment. Instead they make but one exception, involuntary servitude being permitted to the government in cases of conviction for crime. If the English language has even an approximately definite meaning we must say that the framers of the 13th amendment by making one definite exception meant to exclude all other forms of slavery or involuntary servitude.

A number of forms of service which are apparently comparable to military service and are public services or otherwise sanctioned by usage, and have survived for such reasons, has been called to our attention by the cases, and we herewith list them in somewhat the order of their strength with military service, for the purpose of commenting on same. Military service—service on roads—jury service—service as a witness—service in posse of sheriff—service of sailor—service of apprentice to master—service of child and ward to parent and guardian—power of legislature to punish abandonment of labor in extreme cases—compulsory education—service in the pest-house. The involuntary servitude of a sailor that was held constitutional in the Robertson case, has been abolished by Sections 8304-13 U. S. Compiled Statutes. Neither is compulsory service of an apprentice to a master tolerated here now. Both of these however were non-public ser-

vices but they show how the so-called exceptional cases are going. The Compulsory Road Laws as Justice McReynolds in the Butler case says were at one time in effect in thirty-eight states of the Union but are now in effect in seven states, possibly only five and these all southern states that have not progressed as fast as the balance of the states. Official Good Roads Book United States—Published by American Highway Association at Page 67—Local Revenues and Labor Taxes and the statutes of the states herein cited. One thing is true of this service, as that of Jury, witness and posse service, that the service generally would have been cheerfully rendered without the law. The compulsory feature was simply a more efficient means of perfecting an organization to which few objected later. Jury service and compulsory process for witnesses however, are by express provision provided for in the Constitution. Service of child and ward to parent and guardian, compulsory education and service in the pest-house are not compulsary service in any sense but a mere regulation of liberty not amounting to a deprivation and on the same plane as the well-known limitations on the right of free speech and carrying weapons that do not amount to deprivations of the rights.

There is some dicta in the Robertson and Butler cases supra to the effect that the doctrine that compulsory military service was unconstitutional and incompatible with a free government was a novel doctrine at the time the 13th amendment was adopted, and that it was an exceptional service sanctioned by immemorial usage and needed no expressed exception in the amendment to be excepted from its operation

We need but to refer here to the history of military service as it relates to our laws and institutions and those upon which they are based and herein otherwise set forth and fully discussed to establish the fact that voluntary service was the only one tolerated, and that conscription or compulsory service was the novelty and unconstitutional. It was opposed and every possible guard placed against it at all times.

Under our articles of Confederation Congress had no power to raises armies but had to ask the states for quotas. Our Constitution itself was drawn and intended to perpetuate here all the liberties held by the citizens of England, and to perpetuate and establish more and greater liberties than existed in the mother country and prevent tyranny by the state.

Then followed the 13th amendment, which was in the words of this Court, a charter of universal freedom. Can it possibly be said that the unconstitutionality of Compulsory Military Service is a novel doctrine and that this sweeping provision establishing a principle rather than inhibiting particular cases does not cover it.

One ground for Judge Brown's decision in the Robertson case has been directly overruled by this court in Bailey vs. Alabama supra—That is that a service voluntary at the start by contract is in law voluntary during the period of the contract notwithstanding it is in fact involuntary at any time during the period.

The other ground for the decision, the one in point here, was very much mutilated by the dissenting opinion of Justice Harlan. His opinion was quoted approvingly by District Judge McPherson in Union Pacific Railway vs. Ruef 120 Federal 102-111.

Judge Brown did not have an exceptional public service to deal with, as did Judge McReynolds, it was simply an exceptional private service. The seaman's law in question has been long abolished by congress in strict conformity to what we think was the spirit coming from the 13th amendment and the times of its adoption, and we are sure the dangers that Judge Brown feared from such a rule as set out in his opinion have undoubtedly not been realized. Judge Harlan says in that opinion that public service is in no legal sense involuntary servitude. But that cannot lie considering the broad definition of the term laid down in the Clyatt and Bailey cases.

Judge Brown also classes the 13th amendment with the Bill of Rights and cites what he calls exceptions: A careful perusal thereof seems to us will show that such exception so-called would be mere regulations not amounting in any sense to a deprivation of the right.

In five cases cited in State vs. Wheeler, the 13th amendment was not raised and the same was true of Sawyer vs. Alton. That in Dennis vs. Simon the amendment was raised but not discussed, and the Canadian case could have no bearing anyway under our Constitution. Only Dassler vs. Kansas supports it, and the law and a decision on it were bitterly attacked as an entering wedge in a case of apparently no moment to be used as a basis for a decision in a case of tremendous moment which would amount to slavery to the state.

But in all of the above mentioned cases, which are apparently comparable to compulsory military service there is one elemental difference between them

and compulsory service. The servitor loses none of his rights as a citizen of the state wherein he resides or of the United States. He still has the right of suffrage, the right to be represented by an attorney, the protection of the civil laws, and in cases of transgression, the right to be tried by a jury under the provisions of the civil laws and to receive such punishment as provided by the civil laws. Furthermore the terms of service is temporary and definitely fixed by the laws and customs permitting the same.

In the case of military service, the servitor becomes a mere tool in the hands of his superiors. Except, where given that right by statue, which has been done in a very few states, he has lost the right of suffrage, he has lost the protection of the civil laws. He is bound by autocratic rules and regulations promulgated by the President, Congress, the War Department, and a host of immediate superiors and which are enforced according to the whim of the commanding officer. When he transgresses he is tried by court martial. He can have no attorney to present his facts and defend him, no jury to pass upon the evidence, and the kind and amount of punishment lies in the justice and mercy of his military judges. The Constitutional guarantee of the right of suffrage and the right of jury trial, the protection and duties of the civil laws afford him no relief. His paramount duty is to obey, blindly and implicitly the military commands and regulations, his only privileges are those granted by the superior military authorities and his only protection is the justice and mercy of his military judges.

True his term of service is at present fixed by sta-

tute, but with compulsory military service enforced, and the right of suffrage limited to a majority of those directly or indirectly benefited by compulsory military service and a great standing army, what guarantee is there that the term of such service will not be extended indefinitely or made a life service? What guarantee is there that we will not build up in this country a military caste and a military system that would make the German system appear an inefficient weakling?

Voluntary military service is based on a contract; but some of the cases seem to indicate that after the contract has been consummated it becomes more than a contract, that it becomes a status which binds the servitor in the service until the contract expires or is terminated by the consent of the parties.

Even if this be true we must admit that the status is based and must be based on a contract voluntarily entered into by the parties. If a status, involving the liberty, the very life and limb of the servitor can be created by law based on compulsion and force, then the whole structure work of republicanism crashes to the ground, and the liberties of the individual, hewn by centuries from the bodies of countless martyrs become a mirage. Conscription presupposes no voluntary contract of service, therefore no status has and can be created, the services rendered become an involuntary servitude such as is forbidden by the 13th Amendment. The English speaking people have always feared and abhored compulsory military service as a careful reading of their statutes, parliamentary debates and legal discussions will show. The draft act of the 60's was never passed upon by the

federal courts. Although passed in the midst of a great civil war, the conscript army so raised to be used in quelling an insurrection that meant the destruction of the very nation itself, the Act provoked riots and opposition from one end of the country to the other, altho the act was not rigidly enforced and permitted the drafted man to hire a substitute for a reasonable amount. The people still smarted from the sting of its lash, still bitterly resented a curtailment of their liberties and then their representatives, acting upon public demand, passed and made a part of the great national constitution the famous 13th Amendment, and in that Amendment its framers, with the Draft Act and its riots and opposition still fresh in their minds, pronounced, NEITHER slavery NOR involuntary servitude, except as a punishment for crime.... shall exist. Knowing the military history of their country and their mother country, knowing that a vast number of the population considered the draft Act unconstitutional, they used a few brief nouns having a definite meaning, the conjunctives 'neither, nor' and the transitive verb 'shall', and in that single terse command "neither slavery nor involuntary servitude.... shall exist," they inserted the one single exception, "except as a punishment for crime whereof the party shall have been duly convicted."

III

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4 of the Constitution of the United States and Article 10 of the

Amendments to the Constitution of the United States, in that Congress attempts to require the State officials to do that which is prohibited to the States themselves. Chief Justice Marshall in an early case has well stated the relation existing between the State and Federal Governments and in discussing this subject he said,

> "The powers exclusively given the Federal Government are limitations upon the State authorities but, with the exception of these limitations, the States are supreme and their sovereignty can be no more invaded by the action of the State Government than the action of the State Government can arrest or obstruct the course of National Power."
>
> Worcester vs. Georgia 6 Peters 570

The right of the Federal Government to interfere with the sovereignty of the State was raised in the case of Collector vs. Day. Congress having passed an Act providing for the raising of revenue by an income tax, one of the United States Collectors collected from Judge Day, a State Official, a tax on his salary which was paid under protest and an action brought to recover it. Mr. Justice Nelson in commenting on the Act said

> "The Federal Government and the States, although both existing within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limit of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States" and therefore it was held that the Federal Government could not tax the income of the State Officials since it would interfere with the

efficieney of the State Government. 11 Wallace 113, 124.

The Dual form of government existing in this country and the supremacy of each government within its own sphere, precluding the right of interference on the part of the other government within that sphere, has becenie well settled after a thorough discussion of this relationship in our courts by some of our greatest jurists.

United States against Railroad Company, 17 Wallace 322, 332.

McCulloch vs. Maryland 4 Wheaton 316—405.

Dred Scott vs. Sanford 19 Howard 401.

Kohl vs. United States 91 United States 367—372.

The courts have recognized that when the States had established their independence of Great Britain the powers which had existed in the King and Parliament were taken over by the people of the States and that later certain grants of this power was given to the Federal Government; but only to the extent of these grants are the States and the people limited in their powers. In the case of Martin et al vs. The Lessee of Vaddell the court said,

> "When the Revolution took place the people of each State became themselves sovereign." "When the people of New Jersey took possession of the reins of the government and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or Parliament, became immediately rightfully vested in the State."

16 Peters 410, 416.

The fact that one government is supreme in a given field does not permit it to use that as an excuse to

so exercise its powers as to interfere with the workings of the other as a separate government. In fact as far as the Federal Government is concerned the Constitution of the United States has made it a duty of Congress to guarantee to every State of the Union a republican form of government and this injunction of the Constitution applies to the acts of the Federal Government as well as to those of any foreign country.

In Martin vs. Hunter's Lessee the court said,

> "I am firmly pursuaded that the American people can no longer enjoy the blessings of a free government whenever the States Sovereignty shall be prostrated at the feet of the Federal Government."

1 Wheaton 363.

In the case of Texas vs. White the court again emphasized this proposition and said,

> "Not only therefore, can there be no laws of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

In the light of these decisions and the provisions of the Act of May 18,1917 above quoted, it is difficult to realize that Congress would attempt to place on the Statute Books of this nation a law containing the provisions set forth in Section 6 of said Act which reads as follows:

> "All the officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or ap

> pointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct.....Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty:..... shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by courtmartial and suffer such punishment as a court-martial may direct."

In accordance with the provisions of said Act of May 18,1917, the President prescribed certain registration regulations, and Section 5 of said regulations after quoting in full Section 6 of said Act reads as follows:

> "It will be found by an examination of these regulations which contain the President's directions to officers of the Nation, State, counties, and municipalities, and to other persons designated to perform duties in connection with the registration, that the President has directed specific duties to be performed by certain of such officers and that he has authorized the Governors of States and officers of counties and municipalities to employ certain persons as agencies in the execution of this act. Since the act prescribes the penalty of imprisonment (with no alternative of fine) for the failure or neglect of such officers and agencies to perform duties so prescribed by the President, every person charged with duties should carefully study the instructions in general, and in particular so much thereof as pertains to his own peculiar duties."

These regulations prescribe that the Governor of the State shall appoint the Registration Board in all Counties or similar divisions outside of cities of 30,000 population or over, that he shall notify such Boards of the date for Registration and of all their duties and direct the Sheriff in said Counties to appoint Registrars in each voting precinct. (Section 19.)

He shall direct the Mayor or similar official to appoint the Board of Registration in the case of cities of 30,000 or over. He shall see that all such appointments have been made. He shall notify the Wardens of Penitentiaries and other penal institutions that they shall register their inmates. (Section 20.)

He shall see that the proper Registration Booths are provided throughout the State. (Section 21.)

He shall distribute forms for registration to the penal institutions and to the Sheriffs and Mayors within the State where there is a deficiency in the supply of forms. (Section 23.)

He is required to speed up the work of registration. (Section 24.)

On the sixth day after the President's Proclamation he is required to report to the Provost Marshal General regarding the condition of the supply of forms and as to whether the organization is in readiness in his State. (Section 25.)

He is to receive the summaries of the county and city returns on the day after registration and shall consolidate these returns and telegraph the same to the Provost Marshal General. (Section 26.)

He shall later receive a complete summarization of the registration in the various counties and cities of the State and consolidate these and forward them to

the office of the Provost Marshal General by mail without delay. He shall also secure a list of persons who have rendered uncompensated service and consolidate these showing the names and addresses and forward them to the office of the Provost Marshal General without delay. (Section 28.)

The duty of the Mayor or similar officer in a city of 30,000 or over as set forth by the Registration Regulations are as follows: He shall appoint a Registration Board for approximately each 30,000 population. He shall collect, receive and forward all copies of the Registration cards and reports from his city and shall conduct all the correspondence for the Board of Registration in his city with the office of the Adjutant General. (Section 10.)

He shall instruct the officers within such cities to provide for Registration Booths and see that such booths are provided. (Section 21.)

He is to receive the forms for registration, verify the number sent him, notify the Governor that he has received the same and the condition of readiness in his city. (Section 23.)

On the sixth day after the President's Proclamation he will report to the Governor by telegram concerning the state of supply of forms and the appointment of Registrars. (Section 25.)

On the day after Registration he shall telegraph a summary of the city returns to the Governor. (Section 26.)

He shall prepare a complete summarization of the Registration in his city and report the same to the Governor by mail and shall furnish the Governor with a list of persons who have rendered uncompensated

service. (Section 28.)

He must furnish Registration Cards to the City Clerk and receive the Registration Cards from the sick and those temporarily absent and turn them over to the proper Registrars. (Section 35.)

The duties imposed upon Sheriffs of the various counties of each State by the Registration Regulations are similar to those imposed upon the Mayor.

Prosecuting Attorneys and City Attorneys are required to act as the legal advisors of the Registration Boards and Registrars and aid and advise in all matters touching Registration. (Section 15.)

City and County Clerks are required to furnish cards to the sick and non-resident persons, to certify to said cards and must familiarize themselves with the duties of the Registrars and instructions in order to answer all questions. (Section 32.)

After setting forth the above required duties on the part of the State, County and City Officials the Registration Regulations in Section 29 declares that:

> The foregoing are only the immediate duties of the governors and mayors of cities of 30,000 population or over in connection with the registration. For the further purposes of supervising the draft, the office and duties of the State organization are of ever-increasing importance, and it is the intention to decentralize the execution of the law and place its execution in each State in the hands of the governor and others named to perform certain duties.

Thus instead of Congress raising an army in accordance with the provisions of the National Constitution it has passed an act which requires the States through their Officials to raise armies under the supervision of the President and the War Department.

By the Constitution and laws of the various States, Governors, Sheriffs, Mayors, County and City Clerks and other County and State Officials are elected and have certain duties to perform. By this act of Congress and the regulations prescribed thereunder these State, County, and City Officials are required to take up the new duties imposed upon them by the Federal Government and if any one of them fail or refuse to perform these duties, he is liable to arrest by the United States Marshal to be tried in the Federal Courts and upon conviction to be sentenced to serve not more than one year. Their State duties are to give way to the orders of the National Executive and in all of these acts they are doing that which is forbidden to the State of which they are an official, to wit:—the raising of an Army.

In Collector vs. Day, supra, the Supreme Court of the United States held that the Federal Government could not tax the salaries of the State or County officials as that would interfere with the rights of the State to maintain its sovereignty. How much less may the State maintain its sovereignty if its officials are required to give of their time and services in carrying out the mandates of the Federal Government and upon their failure to do so shall be taken from their offices and incarcerated.

If any power outside of the State Government or its citizens can control the acts of the State officials, whether that power be a foreign prince or potentate, a United States Congress or President, then that State loses its republican form of government. If a State government is to continue its existence within the Nation, its officials must be free to exercise their

duties as laid down by the State Constitution and the laws enacted thereunder, unless in violation of the National Constitution, without interference from other sources claiming the power to control and dominate them as State Officials.

IV.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1 and Section 8, Article 1, of the Constitution of the United States in that Congress attempts to delegate legislative power to the President of the United States and other United States and State Officials, to raise an Army.

Section 1, Article 1 of the Constitution of the United States provides,

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8, Article 1 provides,

> "The Congress is to have the power: ..... to raise and support armies; .....to make rules for the government and regulation of the land and naval forces."

Section 2, Article II provides,

> "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."

The authority of the President over the army was discussed by some of the authors of the Federal Constitution after the Constitutional Convention adjourned, in one of a series of papers published to influence the States to adopt the Constitution, which

papers were later published in a volume known as "The Federalist." This particular paper was prepared by Alexander Hamilton and in it he compared the authority of the President over the Army and Militia with that of the King of England and the Governor of New York. Among other things he said,

> "The most material points of difference are these: First, the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain, and the Governor of New York have at all times the entire command of all the militia within their respective jurisdictions; Second, The President is to be Commander-in-chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British King extends to the declaring of war, and the raising and regulating of fleets and armies."—The Federalist, Chapter LXIX pp 343.

Another eminent authority on the Constitution of the United States has said that

> "a settled maxim in Constitutional law is that the power conferred upon the Legislature to make the laws can not be delegated by that department to any other body or authority."—Cooley General Principles of Constitutional Law, pp87.

In the case of Field vs. Clark 143 U. S. 649,692 the court stated,

> "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government organized by the Constitution."

In applying these principles the Federal Courts have held that Congress cannot authorize the Secretary of the Interior to make provisions or protection against destruction by fire and depredation upon the public forest reservations and provide for the punishment for violation of said law or regulations of the Secretary.

U. S. vs. Blasingame 116 Fed. 654.

Also that Congress cannot delegate to the Secretary of War the power to determine whether a bridge lawfully constructed is an obstruction and must be removed.

U. S. vs. Keokuk etc. Bridge Company 45 Fed. 178.

The authority of the President over the army and navy has been made a subject of ruling by the Attorney General of the United States from time to time and in those opinions the fact has been emphasized that the President has no Legislative powers except as he may veto legislation. Further that the Constitution has carefully distinguished the two powers of the executive, or administrative, and the legislative, one from the other and has held various regulations made by the President to be void under the Constitution.

6 Opinions Attorney General 10 (1853)
10 Opinions Attorney General 413 (1862)

In all civilized countries of the world there has been an age-long struggle between the Executive and the Legislature for supremacy. For centuries the history of the English people has been simply a story of the struggle between the King and Parliament for domination of the English Government, with the

authority of Parliament gradually gaining ascendency. This is simply one of the reflexes of the struggle of the people against Absolutism and each victory gained for Parliament has been one more step in the progress towards Democracy. This feeling against immense power being placed in the hands of the Executive was reflected in our National Constitution, which provides for a President with limited powers and having the same amount of authority continuing so long as that instrument remains unchanged.

There are, however, many in this country who look upon the relative powers of the various departments of government as something to be determined by the amount of influence a given department may exert over the others rather than by the Constitution, and especially is this true of the Executive. One authority states that "the presidency has been one thing at one time, another at another, varying with the man who occupied the office." "The office was one thing from 1789 to 1825 when English precedents and traditions were strongest, and another thing during Jackson's time when he worked his own will with or without sanction of law and still another thing from 1836 to 1861 when the Presidents lacked personal force to dominate the other branches of government, and yet another when Lincoln "seemed for a little while to become the whole government."

Woodrow Wilson—Constitutional Government pp 57, 58.

This same authority in discussing the authority of the President said,

"The makers of the Constitution seem to have thought of the President as what the sterner Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of the law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it."

Ibid pp 59, 60.

While we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of Constitutional principle."

Ibid pp 59.

The fact that there is a danger, under practically any form of Constitutional government of a man of blood and iron or of great military genius overthrowing the authority of the legislature and taking over to himself most of the prerogatives of the government, is admitted by Bryce, the greatest English authority on the American Constitution, when he says that Julius Ceaser was more than a match for the Senate, Cromwell for the Long Parliament, Louis Napoleon for the French Assembly of 1851, and when the President happens to be a strong man, resolute, prudent and popular, he may well hope to prevail against a body which he may divide by a dexterous use of patronage or otherwise.

American Commonwealth pp 165.

During the short period of our National existence

there have been many intense struggles fought out upon the floor of Congress to maintain the integrity of our National Constitution. It has been assailed from many sources and for many purposes, but during this whole time it has never had a stauncher supporter or a more able exponent than Daniel Webster, who, although in the minority at times, consistently opposed what he considered unconstitutional usurpation of power by the President and equally unconstitutional acts of Congress in granting the President powers that appeared to be legislative. In discussing the Fortification Bill of 1835 which provided for the appropriation of $3,000,000 for military and naval services to be expended under the DIRECTION of the President he said,

> "The honorable member from Ohio, near me, has said, that if the enemy had been on our shores he would not have agreed to this vote, and I say, if the proposition were now before us, and the guns of the enemy were pointed against the walls of the Capitol, I would not agree to it. The people of this country have an interest, a property, an inheritance in this instrument, against the value of which forty capitols do not weigh the twentieth part of one poor scruple. . . . For my part, I am content to show France that we are prepared to maintain our just rights against her by the exertion of our power when need be, according to the form of our own constitution; that, if we make war, we will make it constitutionally; and that we will trust all our interests, both in peace and war, to what the intelligence and the strength of the country may do for them, without breaking down or endangering the fabric of our free institutions."
>
> Works of Daniel Webster Volume IV, pp 226, 228.

While it is true that the courts have recognized

the right of Congress to authorize the working out of details by the Executive Department, it has only been where these details were considered to be administrative acts rather than legislative. However, in this Act of May 18, 1917, we find that its purpose is "to AUTHORIZE the President to increase temporarily the military establishment of the United States." No where in the Act is there any provision for raising a single additional unit or a member of any portion of the army. The preamble states "that in view of the existing emergency, which demands the raising of troops in addition to those now available," and then proceeds to fail to provide for the raising of a single additional man, unless the President so desires. By this act Congress declares that the situation is such that additional troops should be raised and then proceeds to authorize the President to say whether any troops shall be raised and, if so, whether they shall be raised by additions to the Regular Army, the calling out of the National Guard, the conscripting of men from the unorganized militia, or by voluntary enlistment. Such an act the plaintiff in error contends to be clearly the delegation of legislative powers to the President.

V.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of the fifth Amendment of the Constitution in that it subjects citizens of the United States to deprivations of life or liberty without due process of law, since it assumes to confer upon the President of the United States discretion-

ary and arbitrary powers in the selection of citizens into the draft army. This Court has repeatedly commented upon the acts of Congress which tend to take away the rights of the people under various guises. This attitude was well stated by the court in the case of Boyd vs. U. S. when he said that

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed, a close and literal construction deprives them of half of their efficiency, and leads to gradual depreciation of the rights as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon."
>
> 116 U. S. 635.

These words of the learned judge have been quoted approvingly in several cases since that time.

In Re Debs 158 U. S. 594.

Gulf, Colorado & Santa Fe Ry. vs. Ellis 165 U. S. 154.

Fairbanks vs. U. S. 181 U. S. 301.

Brown vs. Walker 161 U. S. 617-635.

U. S. vs. Wong Kim Ark. 169 U. S. 654.

There can be but little dispute but that a person who becomes a member of the army loses his liberty or at least a large portion of it, but an army organized upon any other theory would have but a small degree of efficiency. This fact is well stated by Mr. Justice Brown in the case of U. S. vs. Clark when he says,

> "To insure efficiency, an army must be to a

> certain extent, a despotism. Each officer, from the General to the Corporal, is invested with an arbitrary power over those beneath him and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence."
>
> 31 Fed. 710.

When a man enlists in the regular army or the National Guard, he agrees to accept this new status so that there is no infringement upon his liberty. Under the provisions of this Act of May 18, 1917 this plaintiff in error is to be taken and forced into the National Army on the decision of a person or persons appointed by the Governor of Minnesota and the Mayor of the City of St. Paul; forced to leave his business, to lose the right to support his family, lose his character as a citizen, his franchise, his civil right of a jury trial, the right to a trial in the civil courts, and his rights to the protection of the laws of the land. Can the deprivation of liberty mean more than this, and yet, under the National Constitution, the State or its officials have no right to raise an army.

It is evident from a careful reading of the Act approved May 18, 1917 that Congress recognized the fact that it was doubtful whether under ordinary circumstances and conditions of the nation it had the authority to pass such an act. This is shown by the preamble which gives the reason for the passage of the act in which it says "that in view of the exist-

ing emergency," and there is also a repeated reference to the 'existing emergency' throughout the various sections of the act. But the fact remains that an "existing emergency," either real or fancied, is no reason for the passage of a law which in itself is unconstitutional. This theory has been set aside for all time under the decision of this Court in the case of Ex Parte Milligan, a case growing out of the conditions of the time when this country was facing the most serious 'emergency' that has developed durin our history, and in that case this Court said.

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."
> 4 Wall 2, 142.

An "emergency" may be the basis and excuse for the passage of a law by Congress, but never the basis or reason for a decision or opinion of this court. Exercise of a power enjoyed by Congress is permitted as is of course, but 'emergency' as a reason for its constitutionality, is utterly unsound. Congress or the Executive through one cause or another may not be able or willing to find and use constitutional means to cope with a supposed existing emergency, but that does not signify it is not there, it only signifies they have been unable to find one, or are unwilling to use one that is known. The people are the ultimate authority is such a case, and if an emergency in fact exists, which cannot be reached under the Constitu-

tion, it can be met under the power of the Amendment as provided by Article 5 of the Amendments to the Constitution. In the past we have met great domestic crises and upheavals, and foreign dangers from which the people, through Congressional action, apparently for the time being, were unable to find immediate Constitutional means of relief; however, when the courts have refused to sanction the unconstitutional means proposed, Congress has been able to meet the situation, when necessary, with means that were Constitutional. For over one hundred years we have found the Constitution ample to meet every emergency and today the present emergency can be met without any encroachment upon either letter or spirit of that instrument—our fundamental law, but the Act approved May 18, 1917 violates both.

In conclusion this Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations prescribed thereunder are null and void in that Congress has no power under the National Constitution to raise an army by conscription. This fact is emphasized by the fact of the hostile attitude of the people of England and the American Colonies, during the 18th century, toward a standing army; and by the further fact of limiting the authority of Congress over the most important military force of that time—the militia.

This Act being an attempt by the federal government to raise an army by conscription, is in violation of both the letter and spirit of the Constitution, in that it is an attempt to force the members of the militia into the national army by means other than that prescribed by that instrument. The rights of the

members of the militia to be officered and trained by the States, as granted them by the Constitution, are denied and overridden by the provisions of this Act. Furthermore, since none of the conditions under which Congress can call forth of the militia exist, the militia, both organized and unorganized, could not be called forth either by Congress or the President, even though the act provided for the proper method of doing so.

However, if Congress had the authority to raise an army by conscription, this right was lost by the adoption of the XIII Amendment to the Constitution which prohibits involuntary servitude except as a punishment for crime.

If by any possible interpretation of the Constitution, Congress has authority to raise an army by conscription, it is clear that that authority can not be delegated to the President or any other administrative officer of the United States or of the States, yet the Act in question, makes no provision for raising an army, but authorizes the President, in his discretion, to provide for raising whatever forces he desires and in the manner in which he wishes. We urge that such a delegation of power comes within the inhibition of the Constitution.

Furthermore, by the provisions of this Act, various state officials are required to engage in the raising of an army under the direction of the President, and for failure or refusal to obey the dictates of the President are liable to arrest and imprisonment. This plaintiff in error is drafted by state officials into the national army while the Constitution prohibits the raising of such an army by the States. Also this

compulsion upon officials of the States destroys the sovereignty of the States in that sphere where they are supreme and breaks down the integrity of republican principles in their government.

By this Act this plaintiff in error is to be deprived of his liberty and possibly of his life without due process of law, and, upon the whim of a state official or an appointee of a state official, ordered into the conscript army, but without the rights reserved to him, as a member of the militia, under the Constitution and the laws of the land.

For these reasons Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations of the President prescribed thereunder be declared null and void.

E. E. Latimer

Herbert L. Dunn

Frank Healy

Attorneys for Plaintiff in Error.

NO. [illegible]

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1917

ALFRED F. CRABB, Plaintiff in Error
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
HONORABLE PAGE MORRIS,
Presiding Judge.

T. E. LATHROP,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error.

NO. 394

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1917

ALFRED F. GRAHL, Plaintiff in Error
VS.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
HONORABLE PAGE MORRIS,
Presiding Judge

T. E. LATIMER,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error

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No. 384

IN THE SUPREME COURT OF THE UNITED STATES

ALFRED F. GRAHL, Plaintiff in Error
vs.
UNITED STATES OF AMERICA, Defendant in Error.

STATEMENT.

The Plaintiff in Error was tried and convicted at the June A. D., 1917, Term of the United States District Court for the District of Minnesota, Third Division, of violation of Section Five of the Act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

The Indictment contains one count charging the plaintiff in error did wrongfully and unlawfully, wilfully fail and refuse to register, and present himself for registration as required by said Act, Proclamation and Regulations.

A demurrer was filed to said indictment in which plaintiff in error demurred upon the following grounds, to-wit:—1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the Thirteenth Amendment of the Constitutionn of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section One of Article One, and Section Eight of Article One, of the Constitution of the United States of America, and therefore null and void.

This demurrer was overruled and the plaintiff in error duly excepted thereto, whereupon the case was set for trial July 2d, 1917, at which time he was tried, the jury returned a verdict of "guilty", and the plaintiff in error was sentenced by the Court to serve one year in the Minnesota State Reformatory.

SPECIFICATIONS OF ERROR.

The District Court of the United States for the District of Minnesota erred in overruling the demurrer of defendant.

BRIEF.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are

in conflict with the terms and provisions of Section 8, Article 1, of the Constitution of the United States.

Rhode Island vs. Massachusetts 12 Peters 657

Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

Martin vs. Hunter 1 Wheaton 304

3 Annals of 13th Congress 807

Kneedler vs. Lane 45 Pa. 238

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations perscribed thereunder is in conflict with the terms and provisions of the 13th amendment of the Constitution of the United States which prohibits involuntary servitude.

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 3

Plessy vs. Fergurson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 276

Clyatt vs. U. S. 197 U. S. 207

Hodges vs. U. S. 203 U. S. 1

Baily vs Alabama 219 U. S. 219

Butler vs. Perry 240 U. S. 328

U. S. vs. Sanges 48 Fed. 78

State vs. West 42 Minn. 47

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1, and Section 8, Article 1, of the Constitution of the United States in that congress attempts to delegate legislative power to the President of the

U. S. and other United States or state officials.

Stoutenburg vs. Hennick 129 U. S. 141

Field vs. Clark 143 U. S. 649, 692

U. S. vs. Blasingame 146 Fed. 654

U. S. vs. Keokuk etc. Bridge Co. 45 Fed. 178

Cooley, Constitutional Limitations Chap 5 P 137

Cooley, General Constitutional Principles of Law P 87

6 Opinions Atty. Gen. of U. S. 10

10 Opinions Atty. Gen. of U. S. 413

Bryce, American Commonwealth P 165

Wilson, Constitutional Government P 57, 58, 59

Webster's Works

The Federalist Chap. 69 P. 515

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4, Article 4, of the Constitution of the United States, and Article 10 of Amendments to the Constitution of the United States in that Congress attempts to require state officials to do that which is prohibited to the States themselves.

Collector vs. Day 1 Wallace 124, 126

McCulloch vs. Maryland 4 Wheaton 405

Dred Scott vs. Sanford 19 Howard 401

Worcester vs. Georgia 6 Peters 570

Kohl vs. U. S. 91 U. S. 372

U. S. vs. Reese 92 U. S. 214

U. S. vs. Harris 106 U. S. 629

Martin et al vs. the Lessee of Vaddell 16 Peters 410, 416

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Article V of Amendments to the Constitution of the United States providing that "nor shall any person be deprived of his life, liberty or property without due process of law."

In re Debs 158 U. S. 594
Boyd vs. U. S. 116 U. S. 635
Gulf Colo. & Santa Fe Ry. vs. Ellis 165 U. S. 154
Fairbanks vs. U. S. 181 U. S. 301

ARGUMENT.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of paragraphs 12 & 14 of Section 8, Article 1 of the Constitution of the United States in that Congress is attempting to raise an army by conscription.

In arriving at a proper interpretation of various sections of the Constitution this Court has had recourse in the past to an inquiry as to the state of things existing at the time of the adoption of the Constitution, and also a search of the contemporary history of that time.

Rhode Island vs. Massachusetts 12 Peters 657
Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

At the time our Federal Constitution was adopted there were two kinds of military service recognized

in the English speaking world—the militia and the **standing army.**

In the days of the Saxon Kings the militia in England was organized by counties for defence of the realm. This organization survived the Norman conquest in similar form and for similar purpose. Stubb's Select Charters P 153, 154. But Wm. the Conqueror brought with him to England an army composed of feudal and mercenary soldiers and thus planted on English soil a new military organization known as the standing army.

There was great hostility in England toward this army which resulted in many attempts to reduce its size and cripple its strength. It was entirely disbanded during the rule of Cromwell, but again revised and enlarged, and used by the later Stuarts as well as the Tudors as a means or oppression. One of the grievances set forth in the Petition of Rights in 1628 was the oppressive use of the standing army by the King. Appendix Stubb's Select Charters.

This was later expressed in the Bill of Rights offered in Parliament in 1689. One of the accusations against the King being that of "raising and keeping a standing army within his Kingdom in time of peace, without the consent of Parliament, and quartering soldiers contrary to Law. Statute of Realm pp. 142, 145.

Notwithstanding their hatred of the standing army and hostility to its command by the King the fear of invasion from the continent impressed upon them the need for such a military force. This situation was met by Parliament passing the Mutiny Act of 1689 and an act for the restriction of the grant of

revenues. Thus the discipline of the army and the grant of its supplies were made entirely dependent upon the will of Parliament. Since that time the Parliament has renewed this statute annually.—Macy —The English Constitution P 335.

Attempts were made by the Tudor Kings to raise an army by conscription and later a similar attempt by the Stuarts but without success, and until the Revolution of 1688 the British army was composed of mercenary and feudal soldiers. After the Revolution of 1688 several attempts were made in Parliament to provide for the raising of an army by conscription, but the only act applying to conscription that was passed by Parliament before the adoption of our Federal Constitution was passed in 1704, and provided among other things to

> "levy and raise all able bodied, idle and disorderly persons, who can not, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their support and maintenance, to serve his majesty as a soldier."—The Statute 4 Ann Chapter 10.

Later acts of Parliament contained similar provisions, but all attempts to extend conscription to other persons failed.

Statute 29 George II Chapter 4 (1755) 30 George II Chapter 8 (1757) 18 George III Chapter 53 (1778) 19 George III Chapter 10 (1779).

From these facts it may be seen that only paupers and vagabonds could be conscripted into the standing army in England; that no person who could vote for members of Parliament could be conscripted, and to all intents and purposes the membership of

the British army was based upon voluntary service. This fact was emphasized during our War of the Revolution when the Whigs were opposed to the war and the English King was compelled to hire Hessians and others from the continent to make up the English forces fighting against the colonies.

That this feeling against standing armies prevailed in America at the time of the Constitutional Convention of 1787 and especially among the delegates to that Convention is shown by the provision in Section 8, Article 1 of the Constitution of the United States which provides "but no appropriation of money to that use shall be for longer time than two years". The opposition to the raising and control of an army by the president is shown by the provisions of that section which gives to Congress power" to make rules for the government and regulation of the land and naval forces".

That Congress has recognized that it was the intention of the authors of the Federal Constitution to provide for the raising of the Regular Army by volunteer enlistment is shown by one hundred and twenty-seven years of national legislation. During all that time the subject of raising an army by conscription has been discussed in Congress only twice—once in 1814 when a bill providing for the raising of an army by conscription was introduced in Congress at the request of the Secretary of War but failed of being enacted into law. Daniel Webster perhaps the greatest expounder of the Constitution, opposed this measure upon the ground that it was in contravention of the terms and provisions of the Constitution of the United States.

In opposing this measure he said,

> "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, for the general purposes of the war, under the color of a military service...
>
> That measures of this nature should be debated at all, in the councils of a free government, is a cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form....
>
> The administration asserts the right to fill the ranks of the Regular Army by compulsion. It contends that it may now take one out of every twenty-five men, and any part or whole of the rest, whenever its occasions require. Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defense or for invasion, according to the will and pleasures of the government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.
>
> Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty?
>
> Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious

and mischievous government may require it?

In granting Congress the power to raise armies, the People have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the People themselves and they have granted no others. To talk about the unlimited power of the government over the means to execute its authority is to hold a language which is true only in regard to despotism. The tyranny of Arbitrary Government consists as much in its means as in its ends, and it would be a ridiculous and absurd constitution which should be less cautious to grant against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction, a free government without adequate provisions for personal security is an absurdity, a free government with an uncontrolled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered into the head of man."

Van Tyne, The Letters of Daniel Webster.

The question of raising an Army by conscription was again discussed by Congress in 1863 and a Conscription Act was passed by both Houses of Congress and signed by the President. 12 U. S. Statutes at Large 731.

The question of the constitutionality of this act was not determined by the Federal Courts. The only case before the courts in which the constitutionality of this act was considered and determined was in the State Court of Pennsylvania. In the case of Kneedler vs. Lane et al 45 Pa. St. 238 an injunction was sought against the officials entrusted with the duty of enrolling drafted men, to restrain them from

enrolling men in the drafted army on the ground that the Act was null and void and in violation of the provisions of the Constitution of the United States. The Court granted a preliminary injunction by a vote of three to two holding the Act unconstitutional. Later a new judge having been elected and qualified, this position of the Court was reversed and the Constitutionality of the Act upheld. Elaborate opinions were rendered by individual judges and some of the conclusions appear pertinent at the present time. Chief Justice Lowrie urged that if Congress had the right to raise an Army by conscription that this would subject all social, civil and military organizations of the States to the Federal power of raising armies and that nothing would be left that had any constitutional right to stand before the will of the Federal Government. Kneedler vs. Lane Supra pp. 246.

Another fact that was emphasized is that in all cases of forced contribution to the National Government allowed by the Constitution, such as duties, imposts, excises and direct taxes there was fixed the rule of uniformity, equality or proportion. That nowhere in the Federal Constitution is there any reference to forced contribution to the Army or any rules for such contribution as is provided in all other such cases. Kneedler vs. Lane Supra 242.

Judge Woodward calls attention to the fact that a careful study of the Constitution itself shows that there is no intention to authorize the raising of an Army by conscription and sets forth the 16th and 17th paragraphs of Section 8, Article 1 of the Federal Constitution in support of his contention. Kneedler

vs. Lane Supra pp. 256-257.

By the Act of Congress approved May 18, 1917, the first paragraph of Section 1, authorizes the President to raise and organize — — — such a number of increments of the regular army provided by the National Defense Act approved June 3, 1916, or such part thereof as he may deem necessary. This National Defense Act provides that

> "the army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now, or may hereafter be, authorized by the law."

Section 2 of said National Defense Act provides that the regular army shall consist of officers and enlisted men. Section 27 of such act provides that after November 1st, 1916 all enlistments in the regular army shall be for a term of seven years. Section 57 of said Act determines the composition of the Militia as follows:

> "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia."

Sections 69, 70 and 71 of said act provides for enlistment in the National Guard as follows:

> "Section 69—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three

years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Section 70:—Federal Enlistment Contract:—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligations the enlisted man shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this....day of..... 19...., as a soldier in the National Guard of the United States and of the State of..... for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of..... and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of....., and of the officers appointed over me according to law and the rules and articles of war."

"Section 71. Hereafter all men enlisting for service in the National Guard shall sign an en

listment contract and take and subscribe to the oath prescribed in the preceding section of this Act."

However, Section 2 of the Act of May 18, 1917 provides:

> That the enlisted men required to raise and maintain the organization of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and wherever the President decides that they can not effectually be so raised or maintained, then by selective draft."

Thus, for the first time in the history of this nation Congress attempts to provide for the raising of a regular army, an organization based upon voluntary enlistment, by conscription. These drafted men are to be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions of Section 8, Article 1, of the Constitution of the United States which specifically reserves to the States the authority of training the militia and the appointment of officers.

The third paragraph of Section 1 of the Act of Congress adopted May 18, 1917 authorizes the President

> "to raise by draft as herein provided, organize and equip an additional force of 500,000 enlisted men, or such part or parts thereof, as he may deem necessary."

Section 2 of said Act provides that

> "all other forces hereby authorized except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training

cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act."

Section 5 of the same Act provides that

"all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act. Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

By these provisions men between the ages of twenty-one and thirty, not otherwise exempted, among them the plaintiff in error, are to be taken from the group that Congress has designated as unorganized Militia and placed in the Regular Army, National Guard and Drafted Army at the will of the President in violation of the provisions of the Federal Constitution which refer to the militia as follows:—

> "Congress has power — — — to provide for the calling forth of the militia to execute the laws of the Union, to suppress insurrections and repel invasions; to provide for the organizing, arming and disciplining of the militia, and for the governing of such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

By the provisions of the Act of May 18, 1917, the appointment of officers and the authority of training the militia are placed in the hands of Federal Authorities, thus taking away the rights of these members of the unorganized militia which is specifically granted them by the Constitution.

Furthermore, these men who are members of the unorganized militia are not called forth to execute the laws of the Union. Congress, the President, the War Department nor any other authority contends that this army is being called forth for this purpose. The civil authorities are well able to execute the laws of the Union. There has been no need for any portion of the National Military Forces to be called forth to suppress insurrections, either now existing or likely to exist in the future, and the emergency set forth in said Act does not refer to insurrections. Also there is no foreign foe on our soil who is to be repelled nor is there any body of foreign troops quartered in the vicinity of our soil from whom an invasion is imminent. The existing emergency referred to in the Preamble of said law and in the several sections thereof is not due to the inability of this Government to "execute the laws of the Union".

out the Militia to the three instances enumerated in

It may be pertinent to call attention to the fact that the "existing emergency" repeatedly referred to in the Act of May 18, 1917 grows out of a declaration of Congress that a state of war exists between this country and Germany and from said emergency there has developed no failure to execute laws, no insurrections and no invasions of our soil, but already a portion of the Regular Army of the United States is in France. Members of the National Guard are on the way to Eastern Ports of embarkation, cantonments have been built for the training and housing of the first draftetd army, and preparations are being made for the call of the second drafted army. as provided in paragraph 4, Section 1, of the act of May 18,1917. Instead of being called forth to repel invasion, our military forces including the National Guard and the unorganized Militia are being ordered across the Atlantic Ocean, there to engage in warfare three thousand miles from our soil, and Congress has authorized the President to authorize the Governor to authorize the Mayor to authorize the Local Exemption Board to call forth this plaintiff in error, a member of the unorganized militia to engage in this warfare.

During the whole history of the English speaking people, no such power has been exercised by the national, Legislature or Executive except as applied to paupers and vagabonds, and the attempted usurpation of said power was one of the contributing causes of the downfall of the Stuarts.

It may be well to examine the status of the Military system of England from which was developed the Militia of the Colonies, the early States, and later of

the United States. From the earliest time the militia has existed in England as a local force for defense. Stubbs Select Charters pp. 163 and 164. By statutes of Edward III, Chapter 2, and 4 Henry IV Chapter 13 the members of militia could not be compelled to go out of their Shires; by Statute 25 Edward III Chapter 8, and 26, George III Chapter 107 the members of the militia could not be ordered out of their own country unless in case of urgent necessity certified to by Parliament, and could not be sent out of the Kingdom under any circumstances whatever. The last statute above mentioned was passed in 1786, only one year prior to the meeting of the Constitutional Convention in Philadelphia.

Mr. Dicey in the Law of the Constitution pp. 287-288 states that

> "the Militia is a Constitutional Force existing under the law of the land for the defense of the country—embodiment indeed converts the militia for the time being into a regular army, although an army which can not be required to serve abroad."

The members of the Constitutional Convention clearly recognized the English theory of a militia as a force for internal defense and definitely limited the power of Congress and the President over this military force as is shown by the provision in Section 8 of Article 1 of the Constitution, where the right of appointment of officers and the authority of training the militia is specifically reserved to the States and Congress was limited very definitely as to the conditions under which it could call for the militia. Furthermore, in Section 2, Article 2, of the Constitu-

tion the control of the President over the militia as Commander in Chief was specifically limited to the time "when called into actual service of the United States". The attitude of the people of that time is shown by the fact that after all these safeguards were thrown about the Militia in the shape of limitations on Congress and the President it was considered necessary in order to protect the interests of the people to include in one of the first ten amendments to the Constitution, known as the Bill of Rights, Article 2 of the Amendments of the Constitution of the United States as follows:—"A well regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The intention of the authors of our Constitution and the attitude of the people at the time of its adoption is emphasized by an instance occuring at the Constitutional Convention. The Committee of Detail reported the clause authorizing Congress to provide for the calling forth of the militia and among other provisions included that of to "enforce treaties". Gouverneur Morris moved to alter this clause by striking out the words "enforce treaties" and this was adopted by a vote of the Delegates. Journal of Congress pp. 454-594.

If there could be any doubt in the minds of anyone regarding the intent of the members of the Constitutional Convention as to the power which the Constitution granted to Congress and the President over the militia, this act of striking out the provision giving the power to Congress to call forth the militia to enforce treaties placed the Convention clearly on

record as limiting the power of Congress in calling the Constitution, all of which are for service at home and within the boundaries of the Nation. In an early case Mr. Justice Story in discussing the rights of Congress over the militia stated:

> "It is almost too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in the clauses; and that in all other respects and for all other purposes, the militia is subject to the control of the government of the State authorities."—Houston vs. Moore 5 Wheaton 1, 51.

In 1912 during the administration of President Taft it appeared that an emergency might arise and a greatly increased number of troops might be needed and the question of calling forth the militia to be used in foreign warfare was seriously considered, and an opinion regarding the rights of Federal authorities to call forth the militia in such an emergency was taken up with the Attorney General of the United States and he was requested by the Secretary of War to give an opinion on the subject. In accordance with this request Attorney General Wickersham gave an elaborate opinion and among other things said:

> Sir: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:
>
> "Whether or not, under existing laws, the President has authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?"
>
> It is certain that it is only upon one or more

of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term "to repel invasion".

Then, too, "if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling invasion."

"What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsory executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

"So that when an armed force is used to compel the observance of treaty obligations or to punish or obtain compensation for their violation there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

"These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or its Territories. In the history of this

provision of the Constitution there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government was intended as a distinct limitation upon their employment.

"The militia of the States, restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties or to protect the rights of the government or its citizens in those cases in which protection must be sought beyond the territorial limits of the country."

"I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative."

This opinion was accepted by the President who was himself a jurist of ability and a careful student of the Constitution. This opinion of the Attorney General is binding upon the Executive Department of the Government and it has been recognized as correct by the present Executive administration. President Wilson in an address delivered in New York

City on January 27, 1916 said,

> "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our National defense should be built up and encouraged to the utmost; but you know, gentlemen, that under the Constitution of the United States the National Guard is under the direction of more than two score States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of actual invasion has the President of the United States the right to ask those men to leave their respective States."

He later made similar addresses at Cleveland, Ohio on January 29, 1916, at Milwaukee, Wisconsin on January 31, 1916 and at Topeka, Kansas on February 2, 1916.

New York Times Jan. 30th, 1916, Feb. 1st, 1916, Feb. 3rd, 1916.

The Act of May 18th is a violation of the 13th Amendment of our Constitution reading as follows:—

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The 13th amendment has been construed by this court in nine cases that are pertinent here as follows:—

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 417

Plessy vs. Ferguson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 275
Clyatt vs. U. S. 197 U. S. 207
Hodges vs. U. S. 203 U. S. 1
Bailey vs Alabama 219 U. S. 219
Butler vs. Perry 240 U. S. 328

The application of this Constitutional provision to the case at bar involves the construction of the entire amendment, possibly the definition of the word slavery, and an interpretation and construction of the phrase involuntary servitude. We take up the last of these first as being the more important.

The phrase involuntary servitude simply means a condition or status of compulsory service the clearest applicable term to the service provided for in the law.

Century Dictionary—Revised and enlarged Edition Volume 8, Page 5519.

Oxford New English Dictionary—Servitude Vol. 8, Page 522.

Funk & Wagnall's Standard Dictionary—Servitude, Volume 8, Page 522.

Universal Dictionary of the English Language—Volume 4, Page 4213.

In the second and third of such authorities, Military and naval service are cited as examples of such service that existed in India and in England in the very early days.

Bouvier's Law Dictionary, Vol. 2, Servitude, 15th Edition.

Black's Law Dictionary, 2nd Ed. Page 656.

In State vs. West, 42 Minn. 47, Mr. Justice Mitchell says,

"There is nothing better settled than that en-

forced labor is involuntary servitude within the meaning of such constitutional provisions.

This court has defined it as a condition of compulsory service in the Clyatt case supra page 215 and the Bailey case supra page 243.

The Robertson case supra in effect admits that military and naval service are within the letter of the inhibition of the 13th amendment.

The amendment prescribes that the condition of compulsory service shall not EXIST in this land, and is clearly self-executing, and by the use of the word EXIST it places its inhibition on every individual, and on the National Government as well as the states.

As an inhibition on the national government Robertson vs. Baldwin supra in a case involving the constitutionality of a natonal law condemned for permitting involuntary servitude classes the amendment with the Bill of rights as a limitation on the power of the Federal Government. Harlan, Judge in the dissenting opinion thereto pages 292-3 so classes it, citing the opinion of Mr. Justice Miller in the Civil Rights cases supra at page 20, paragraphs two and three. See also dissenting opinion to that case at page 35, paragraph 2. To the same effect see numerous and clear expressions of the court in the Plessy, Clyatt and Bailey cases supra.

Also U. S. vs. Sanges 48 Fed. 78

Black on Constitutional Law, 2nd Ed. Page 461

McClain on Constitutional Law says,

> "Amendment XIII prohibiting slavery or involuntary servitude is applicable not only to the Federal Government, but also to state governments and to individuals as well."

We gather from the foregoing and urge here that thereby the inhibition condemns the practice of slavery, and involuntary servitude, whether the dominant one be either an individual, or the state or National governments, and as well condemns laws by such sovereignties permitting it or compelling it.

In support of this theory we wish to quote the late Justice Moody who as Attorney General ruled, Opinions A. G. Volume 25, Page 474, that the ordinance of the Panama Canal Commission amounting to an executive act of that department compelling laborers contracting with the commission for a term of service to complete their term would be involuntary servitude within the amendment. In short the executive department of the government cannot hold a person in at least that capacity in a condition of involuntary servitude.

Mr. Justice Moody says to the Secretary of War:—

> "I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you inform me that the executive committee of the Panama Commission desires me to formulate a series of rules and regulations the observance of which would enable that committee, in making contracts for the furnishing of labor, to avoid a condition of peonage under the authority of the United States. The word slavery as used in it is descriptive of the chattel slavery which once existed in this country. That any such condition would be established by any officer of the United States is so inconceivable that it need receive no attention. But the words involuntary servitude are much broader than slavery, and include within their meaning many forms of service which cannot properly be described as slavery."

On page 477 he says,

> "I have no hesitation in saying that any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude within the meaning of the Constitution."

On Page 481 he says,

> "I entertain no doubt that the condition described in this ordinance is that of involuntary servitude and not the less involuntary servitude because the contract of service in which the laborer submits to the conditions prescribed by the ordinance was entered into freely and voluntarily and under careful public supervision."

Further on page 482 he says,

> "In the employment of labor on the canal the utmost care should be taken to exclude the conditions which have been indicated as those of involuntary servitude or any other conditions of like effect and tendency. This care should be exercised not only in making the contracts to which the UNITED STATES IS A PARTY, but in scrutinizing the contracts, usages and practices between those who agree to furnish contract labor to the United States and the laborers themselves."

Thus we see that there is substantial authority to the effect that forms of slavery and involuntary servitude practiced by the National Government as a master and laws by it permitting or compelling the condition are unconstitutional. We think too, that the national feeling which forced the 13th amendment clearly shows this through the passage and repeal of various laws such as the various compulsory road laws, and the repeal of the seaman law in controversy in the Robertson case and others to like effect. In practically the only case going into the subject of the compulsory road laws cited in the Butler case supra,

and upon which is based that of Dasler vs. Kansas, the law was vehemently attacked as a minor, subtle entering wedge for the return of forms of slavery to the state, and the court said in passing on it, that we could deal with the more flagrant forms when we came to them. The road laws were accepted as means of organization only, because the service would have been cheerfully rendered without it, as it is in all states of the Union today.

A return to compulsory military service would be a distinct return to the principles of feudalism, and particularly and clearly to that form known as vassalage, denounced by Mr. Justice Field in his dissenting opinion in the Slaughter-House cases supra at Page 69, as within the amendment and in the same class with peonage, serfage, villeinage and etc. Vassalage is herein otherwise treated, but we think we ought to recall the court's attention here to the fact that the essence of it was compulsory military service to the King or Lord, in return for protection and tenure of land.

We find in Henry Wilson's Rise and Fall of the Slave Power in America, Volume 2, Page 60, that the southern states themselves sold slaves on the block at auction. And under such circumstances we have no doubt that the states themselves, through escheat or otherwise, held slaves as did the governments of ancient Greece and Rome. Does anybody doubt that the 13th Amendment inhibited such practices, and such practice by the National Government as Justice Moody says.

The government may regulate the right to quit to such limited extent as does not en-

croach on the spirit of the prohibition protecting the laborer and soldier's liberty which will under ordinary conditions prevent a disorganization of the system. If the state could compel its citizens to labor on the canal, it could compel them to build another Appian way, and the Pyramids. It is true that under most any situation, such action by a government elected by the people is unthinkable, but no one can gainsay the fact that peculiar unsettled conditions among the electorate may produce a despotic government, in which case for at least two years, the Constitution is our only protection.

In Missouri the courts decided in In Re Thompson 117 Mo. 83 that a law authorizing Justice of the Peace to empower the sheriff to hire out vagrants for a period of six months for cash was held involuntary servitude within the 13th amendment. This well illustrates how our country's Constitution has developed and improved on the English Constitution as it was when ours was adopted as to involuntary public service, when compared to the compulsory service of vagrants only in the English army and navy of that time, herein otherwise noted. As otherwise shown compulsory military service generally, was unconstitutional in England at that time and for many years prior thereto.

Every evidence from the language of the amendment itself, and from a history of the character of the times, leads to the conclusion that it is to be contsrued in its broadest sense.

Mr. Justice Field in Slaughter-House cases supra page 90, says:

"Still it is evident that the language of the

> amendment is not used in any restrictive sense. It is universal in its application."

The use of the disjunctives "neither" and "nor" disassociate "slavery" and "involuntary servitude" and render them independent of each other.

The amendment in itself, says Mr. Justice Brown in Robertson vs. Baldwin supra, makes no distinction between public and private service. Would it not follow ordinarily that there was none intended?

The amendment itself makes one exception, that of compulsory service for crime. The inference is to be drawn that there were no others, and that if any were intended they would have been stated. Clearly above any others, no public servitude was intended to be excepted, as service for crime being a public servitude, in which the state is the dominant and the criminal the servient factor, is expressly excepted from its operation, leaving the inference that no others of that class were intended to be excepted. In plain words the only act of sovereignty in which compulsory service is permitted is service for crime.

2 Story on Constitutional Law, Section 1924 says:

> "The 13th amendment forbids not merely the slavery known to our laws, but all kinds of involuntary servitude not imposed in punishment of a public offense.

If the government's theory and contention is correct that all public service, or any compulsory service that the public wishes to impose, or has in the past imposed, is a general exception to the language of the amendment, then the only expressed exception is of no value whatever, and is to be treated as surplusage, and might as well have been eradicated

therefrom by the framers. This court in the past has not been given to such a construction. Under the exception in the language, the state may hold a man to compulsory service for crime.

The amendment in lieu of many other possible words and phrases to express a prohibition uses the drastic phrase and word "shall not exist", clearly making the provision self-executing, denouncing a condition or status, by whomsoever created or maintained, be it individual, corporation, state or Nation.

This court as jealously guards the many and inalienable rights of the people, as it has recently jealously upheld the plenary powers of the government.

The high pitch of the public nerves at the time the amendment was adopted, by reason of the war, the draft act and the riots incident thereto, and many like and subsidary incidents, attest the mood of the public, and its desire and intent for sweeping changes in policy. The fact that the draft act directly preceded the 13th amendment, that it was clearly in the minds of the public, that it engendered terrific opposition, that such an act had theretofore been considered unconstitutional, and the fact that a constitutional amendment prohibiting involuntary servitude, would cover every form of compulsory service, including service to the public, and the legislature in voting on such an amendment would so construe it and believe they were covering this class of service as well as any other, is added reason to give effect to their votes. Today if we were to prohibit by another amendment just such service, we could use no better language considering the broad general language in such instruments than

to repeat the language of the 13th amendment as it now is.

It seems to us that conscription was so clearly in the mind of the public and all bodies proposing or voting on the instrument, that had they intended to make an exception of compulsory military service, they would have done so in the amendment. Instead they make but one exception, involuntary servitude being permitted to the government in cases of conviction for crime. If the English language has even an approximately definite meaning we must say that the framers of the 13th amendment by making one definite exception meant to exclude all other forms of slavery or involuntary servitude.

A number of forms of service which are apparently comparable to military service and are public services or otherwise sanctioned by usage, and have survived for such reasons, has been called to our attention by the cases, and we herewith list them in somewhat the order of their strength with military service, for the purpose of commenting on same. Military service—service on roads—jury service—service as a witness—service in posse of sheriff—service of sailor—service of apprentice to master—service of child and ward to parent and guardian—power of legislature to punish abandonment of labor in extreme cases—compulsory education—service in the pest-house. The involuntary servitude of a sailor that was held constitutional in the Robertson case, has been abolished by Sections 8304-13 U. S. Compiled Statutes. Neither is compulsory service of an apprentice to a master tolerated here now. Both of these however were non-public ser-

vices but they show how the so-called exceptional cases are going. The Compulsory Road Laws as Justice McReynolds in the Butler case says were at one time in effect in thirty-eight states of the Union but are now in effect in seven states, possibly only five and these all southern states that have not progressed as fast as the balance of the states. Official Good Roads Book United States—Published by American Highway Association at Page 67—Local Revenues and Labor Taxes and the statutes of the states herein cited. One thing is true of this service, as that of Jury, witness and posse service, that the service generally would have been cheerfully rendered without the law. The compulsory feature was simply a more efficient means of perfecting an organization to which few objected later. Jury service and compulsory process for witnesses however, are by express provision provided for in the Constitution. Service of child and ward to parent and guardian, compulsory education and service in the pest-house are not compulsary service in any sense but a mere regulation of liberty not amounting to a deprivation and on the same plane as the well-known limitations on the right of free speech and carrying weapons that do not amount to deprivations of the rights.

There is some dicta in the Robertson and Butler cases supra to the effect that the doctrine that compulsory military service was unconstitutional and incompatible with a free government was a novel doctrine at the time the 13th amendment was adopted, and that it was an exceptional service sanctioned by immemorial usage and needed no expressed exception in the amendment to be excepted from its operation

We need but to refer here to the history of military service as it relates to our laws and institutions and those upon which they are based and herein otherwise set forth and fully discussed to establish the fact that voluntary service was the only one tolerated, and that conscription or compulsory service was the novelty and unconstitutional. It was opposed and every possible guard placed against it at all times.

Under our articles of Confederation Congress had no power to raises armies but had to ask the states for quotas. Our Constitution itself was drawn and intended to perpetuate here all the liberties held by the citizens of England, and to perpetuate and establish more and greater liberties than existed in the mother country and prevent tyranny by the state.

Then followed the 13th amendment, which was in the words of this Court, a charter of universal freedom. Can it possibly be said that the unconstitutionality of Compulsory Military Service is a novel doctrine and that this sweeping provision establishing a principle rather than inhibiting particular cases does not cover it.

One ground for Judge Brown's decision in the Robertson case has been directly overruled by this court in Bailey vs. Alabama supra—That is that a service voluntary at the start by contract is in law voluntary during the period of the contract notwithstanding it is in fact involuntary at any time during the period.

The other ground for the decision, the one in point here, was very much mutilated by the dissenting opinion of Justice Harlan. His opinion was quoted approvingly by District Judge McPherson in Union Pacific Railway vs. Ruef 120 Federal 102-111.

Judge Brown did not have an exceptional public service to deal with, as did Judge McReynolds, it was simply an exceptional private service. The seaman's law in question has been long abolished by congress in strict conformity to what we think was the spirit coming from the 13th amendment and the times of its adoption, and we are sure the dangers that Judge Brown feared from such a rule as set out in his opinion have undoubtedly not been realized. Judge Harlan says in that opinion that public service is in no legal sense involuntary servitude. But that cannot lie considering the broad definition of the term laid down in the Clyatt and Bailey cases.

Judge Brown also classes the 13th amendment with the Bill of Rights and cites what he calls exceptions: A careful perusal thereof seems to us will show that such exception so-called would be mere regulations not amounting in any sense to a deprivation of the right.

In five cases cited in State vs. Wheeler, the 13th amendment was not raised and the same was true of Sawyer vs. Alton. That in Dennis vs. Simon the amendment was raised but not discussed, and the Canadian case could have no bearing anyway under our Constitution. Only Dassler vs. Kansas supports it, and the law and a decision on it were bitterly attacked as an entering wedge in a case of apparently no moment to be used as a basis for a decision in a case of tremendous moment which would amount to slavery to the state.

But in all of the above mentioned cases, which are apparently comparable to compulsory military service there is one elemental difference between them

and compulsory service. The servitor loses none of his rights as a citizen of the state wherein he resides or of the United States. He still has the right of suffrage, the right to be represented by an attorney, the protection of the civil laws, and in cases of transgression, the right to be tried by a jury under the provisions of the civil laws and to receive such punishment as provided by the civil laws. Furthermore the terms of service is temporary and definitely fixed by the laws and customs permitting the same.

In the case of military service, the servitor becomes a mere tool in the hands of his superiors. Except, where given that right by statue, which has been done in a very few states, he has lost the right of suffrage, he has lost the protection of the civil laws. He is bound by autocratic rules and regulations promulgated by the President, Congress, the War Department, and a host of immediate superiors and which are enforced according to the whim of the commanding officer. When he transgresses he is tried by court martial. He can have no attorney to present his facts and defend him, no jury to pass upon the evidence, and the kind and amount of punishment lies in the justice and mercy of his military judges. The Constitutional guarantee of the right of suffrage and the right of jury trial, the protection and duties of the civil laws afford him no relief. His paramount duty is to obey, blindly and implicitly the military commands and regulations, his only privileges are those granted by the superior military authorities and his only protection is the justice and mercy of his military judges.

True his term of service is at present fixed by sta-

tute, but with compulsory military service enforced, and the right of suffrage limited to a majority of those directly or indirectly benefited by compulsory military service and a great standing army, what guarantee is there that the term of such service will not be extended indefinitely or made a life service? What guarantee is there that we will not build up in this country a military caste and a military system that would make the German system appear an inefficient weakling?

Voluntary military service is based on a contract; but some of the cases seem to indicate that after the contract has been consummated it becomes more than a contract, that it becomes a status which binds the servitor in the service until the contract expires or is terminated by the consent of the parties.

Even if this be true we must admit that the status is based and must be based on a contract voluntarily entered into by the parties. If a status, involving the liberty, the very life and limb of the servitor can be created by law based on compulsion and force, then the whole structure work of republicanism crashes to the ground, and the liberties of the individual, hewn by centuries from the bodies of countless martyrs become a mirage. Conscription presupposes no voluntary contract of service, therefore no status has and can be created, the services rendered become an involuntary servitude such as is forbidden by the 13th Amendment. The English speaking people have always feared and abhored compulsory military service as a careful reading of their statutes, parliamentary debates and legal discussions will show. The draft act of the 60's was never passed upon by the

federal courts. Although passed in the midst of a great civil war, the conscript army so raised to be used in quelling an insurrection that meant the destruction of the very nation itself, the Act provoked riots and opposition from one end of the country to the other, altho the act was not rigidly enforced and permitted the drafted man to hire a substitute for a reasonable amount. The people still smarted from the sting of its lash, still bitterly resented a curtailment of their liberties and then their representatives, acting upon public demand, passed and made a part of the great national constitution the famous 13th Amendment, and in that Amendment its framers, with the Draft Act and its riots and opposition still fresh in their minds, pronounced, NEITHER slavery NOR involuntary servitude, except as a punishment for crime.... shall exist. Knowing the military history of their country and their mother country, knowing that a vast number of the population considered the draft Act unconstitutional, they used a few brief nouns having a definite meaning, the conjunctives 'neither, nor' and the transitive verb 'shall', and in that single terse command "neither slavery nor involuntary servitude.... shall exist," they inserted the one single exception, "except as a punishment for crime whereof the party shall have been duly convicted."

III

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4 of the Constitution of the United States and Article 10 of the

Amendments to the Constitution of the United States, in that Congress attempts to require the State officials to do that which is prohibited to the States themselves. Chief Justice Marshall in an early case has well stated the relation existing between the State and Federal Governments and in discussing this subject he said,

> "The powers exclusively given the Federal Government are limitations upon the State authorities but, with the exception of these limitations, the States are supreme and their sovereignty can be no more invaded by the action of the State Government than the action of the State Government can arrest or obstruct the course of National Power."

Worcester vs. Georgia 6 Peters 570

The right of the Federal Government to interfere with the sovereignty of the State was raised in the case of Collector vs. Day. Congress having passed an Act providing for the raising of revenue by an income tax, one of the United States Collectors collected from Judge Day, a State Official, a tax on his salary which was paid under protest and an action brought to recover it. Mr. Justice Nelson in commenting on the Act said

> "The Federal Government and the States, although both existing within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limit of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States" and therefore it was held that the Federal Government could not tax the income of the State Officials since it would interfere with the

efficiency of the State Government. 11 Wallace 113, 124.

The Dual form of government existing in this country and the supremacy of each government within its own sphere, precluding the right of interference on the part of the other government within that sphere, has become well settled after a thorough discussion of this relationship in our courts by some of our greatest jurists.

United States against Railroad Company, 17 Wallace 322, 332.

McCulloch vs. Maryland 4 Wheaton 316—405.

Dred Scott vs. Sanford 19 Howard 401.

Kohl vs. United States 91 United States 367—372.

The courts have recognized that when the States had established their independence of Great Britain the powers which had existed in the King and Parliament were taken over by the people of the States and that later certain grants of this power was given to the Federal Government; but only to the extent of these grants are the States and the people limited in their powers. In the case of Martin et al vs. The Lessee of Vaddell the court said,

> "When the Revolution took place the people of each State became themselves sovereign." "When the people of New Jersey took possession of the reins of the government and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or Parliament, became immediately rightfully vested in the State."

16 Peters 410, 416.

The fact that one government is supreme in a given field does not permit it to use that as an excuse to

so exercise its powers as to interfere with the workings of the other as a separate government. In fact as far as the Federal Government is concerned the Constitution of the United States has made it a duty of Congress to guarantee to every State of the Union a republican form of government and this injunction of the Constitution applies to the acts of the Federal Government as well as to those of any foreign country.

In Martin vs. Hunter's Lessee the court said,

> "I am firmly pursuaded that the American people can no longer enjoy the blessings of a free government whenever the States Sovereignty shall be prostrated at the feet of the Federal Government."

1 Wheaton 363.

In the case of Texas vs. White the court again emphasized this proposition and said,

> "Not only therefore, can there be no laws of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

In the light of these decisions and the provisions of the Act of May 18,1917 above quoted, it is difficult to realize that Congress would attempt to place on the Statute Books of this nation a law containing the provisions set forth in Section 6 of said Act which reads as follows:

> "All the officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or ap-

> pointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct.....Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty:..... shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by courtmartial and suffer such punishment as a court-martial may direct."

In accordance with the provisions of said Act of May 18,1917, the President prescribed certain registration regulations, and Section 5 of said regulations after quoting in full Section 6 of said Act reads as follows:

> "It will be found by an examination of these regulations which contain the President's directions to officers of the Nation, State, counties, and municipalities, and to other persons designated to perform duties in connection with the registration, that the President has directed specific duties to be performed by certain of such officers and that he has authorized the Governors of States and officers of counties and municipalities to employ certain persons as agencies in the execution of this act. Since the act prescribes the penalty of imprisonment (with no alternative of fine) for the failure or neglect of such officers and agencies to perform duties so prescribed by the President, every person charged with duties should carefully study the instructions in general, and in particular so much thereof as pertains to his own peculiar duties."

These regulations prescribe that the Governor of the State shall appoint the Registration Board in all Counties or similar divisions outside of cities of 30,000 population or over, that he shall notify such Boards of the date for Registration and of all their duties and direct the Sheriff in said Counties to appoint Registrars in each voting precinct. (Section 19.)

He shall direct the Mayor or similar official to appoint the Board of Registration in the case of cities of 30,000 or over. He shall see that all such appointments have been made. He shall notify the Wardens of Penitentiaries and other penal institutions that they shall register their inmates. (Section 20.)

He shall see that the proper Registration Booths are provided throughout the State. (Section 21.)

He shall distribute forms for registration to the penal institutions and to the Sheriffs and Mayors within the State where there is a deficiency in the supply of forms. (Section 23.)

He is required to speed up the work of registration. (Section 24.)

On the sixth day after the President's Proclamation he is required to report to the Provost Marshal General regarding the condition of the supply of forms and as to whether the organization is in readiness in his State. (Section 25.)

He is to receive the summaries of the county and city returns on the day after registration and shall consolidate these returns and telegraph the same to the Provost Marshal General. (Section 26.)

He shall later receive a complete summarization of the registration in the various counties and cities of the State and consolidate these and forward them to

the office of the Provost Marshal General by mail without delay. He shall also secure a list of persons who have rendered uncompensated service and consolidate these showing the names and addresses and forward them to the office of the Provost Marshal General without delay. (Section 28.)

The duty of the Mayor or similar officer in a city of 30,000 or over as set forth by the Registration Regulations are as follows: He shall appoint a Registration Board for approximately each 30,000 population. He shall collect, receive and forward all copies of the Registration cards and reports from his city and shall conduct all the correspondence for the Board of Registration in his city with the office of the Adjutant General. (Section 10.)

He shall instruct the officers within such cities to provide for Registration Booths and see that such booths are provided. (Section 21.)

He is to receive the forms for registration, verify the number sent him, notify the Governor that he has received the same and the condition of readiness in his city. (Section 23.)

On the sixth day after the President's Proclamation he will report to the Governor by telegram concerning the state of supply of forms and the appointment of Registrars. (Section 25.)

On the day after Registration he shall telegraph a summary of the city returns to the Governor. (Section 26.)

He shall prepare a complete summarization of the Registration in his city and report the same to the Governor by mail and shall furnish the Governor with a list of persons who have rendered uncompensated

service. (Section 28.)

He must furnish Registration Cards to the City Clerk and receive the Registration Cards from the sick and those temporarily absent and turn them over to the proper Registrars. (Section 35.)

The duties imposed upon Sheriffs of the various counties of each State by the Registration Regulations are similar to those imposed upon the Mayor.

Prosecuting Attorneys and City Attorneys are required to act as the legal advisors of the Registration Boards and Registrars and aid and advise in all matters touching Registration. (Section 15.)

City and County Clerks are required to furnish cards to the sick and non-resident persons, to certify to said cards and must familiarize themselves with the duties of the Registrars and instructions in order to answer all questions. (Section 32.)

After setting forth the above required duties on the part of the State, County and City Officials the Registration Regulations in Section 29 declares that:

> The foregoing are only the immediate duties of the governors and mayors of cities of 30,000 population or over in connection with the registration. For the further purposes of supervising the draft, the office and duties of the State organization are of ever-increasing importance, and it is the intention to decentralize the execution of the law and place its execution in each State in the hands of the governor and others named to perform certain duties.

Thus instead of Congress raising an army in accordance with the provisions of the National Constitution it has passed an act which requires the States through their Officials to raise armies under the supervision of the President and the War Department.

By the Constitution and laws of the various States Governors, Sheriffs, Mayors, County and City Clerks and other County and State Officials are elected and have certain duties to perform. By this act of Congress and the regulations prescribed thereunder these State, County, and City Officials are required to take up the new duties imposed upon them by the Federal Government and if any one of them fail or refuse to perform these duties, he is liable to arrest by the United States Marshal to be tried in the Federal Courts and upon conviction to be sentenced to serve not more than one year. Their State duties are to give way to the orders of the National Executive and in all of these acts they are doing that which is forbidden to the State of which they are an official, to wit:—the raising of an Army.

In Collector vs. Day, supra, the Supreme Court of the United States held that the Federal Government could not tax the salaries of the State or County officials as that would interfere with the rights of the State to maintain its sovereignty. How much less may the State maintain its sovereignty if its officials are required to give of their time and services in carrying out the mandates of the Federal Government and upon their failure to do so shall be taken from their offices and incarcerated.

If any power outside of the State Government or its citizens can control the acts of the State officials, whether that power be a foreign prince or potentate, a United States Congress or President, then that State loses its republican form of government. If a State government is to continue its existence within the Nation, its officials must be free to exercise their

duties as laid down by the State Constitution and the laws enacted thereunder, unless in violation of the National Constitution, without interference from other sources claiming the power to control and dominate them as State Officials.

IV.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1 and Section 8, Article 1, of the Constitution of the United States in that Congress attempts to delegate legislative power to the President of the United States and other United States and State Officials, to raise an Army.

Section 1, Article 1 of the Constitution of the United States provides,

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8, Article 1 provides,

> "The Congress is to have the power: ..... to raise and support armies: .....to make rules for the government and regulation of the land and naval forces."

Section 2, Article II provides,

> "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."

The authority of the President over the army was discussed by some of the authors of the Federal Constitution after the Constitutional Convention adjourned, in one of a series of papers published to influence the States to adopt the Constitution, which

papers were later published in a volume known as "The Federalist." This particular paper was prepared by Alexander Hamilton and in it he compared the authority of the President over the Army and Militia with that of the King of England and the Governor of New York. Among other things he said,

> "The most material points of difference are these: First, the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain, and the Governor of New York have at all times the entire command of all the militia within their respective jurisdictions; Second, The President is to be Commander-in-chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British King extends to the declaring of war, and the raising and regulating of fleets and armies."—The Federalist, Chapter LXIX pp 343.

Another eminent authority on the Constitution of the United States has said that

> "a settled maxim in Constitutional law is that the power conferred upon the Legislature to make the laws can not be delegated by that department to any other body or authority."—Cooley General Principles of Constitutional Law, pp87.

In the case of Field vs. Clark 143 U. S. 649,692 the court stated,

> "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government organized by the Constitution."

In applying these principles the Federal Courts have held that Congress cannot authorize the Secretary of the Interior to make provisions or protection against destruction by fire and depredation upon the public forest reservations and provide for the punishment for violation of said law or regulations of the Secretary.

U. S. vs. Blasingame 116 Fed. 654.

Also that Congress cannot delegate to the Secretary of War the power to determine whether a bridge lawfully constructed is an obstruction and must be removed.

U. S. vs. Keokuk etc. Bridge Company 45 Fed. 178.

The authority of the President over the army and navy has been made a subject of ruling by the Attorney General of the United States from time to time and in those opinions the fact has been emphasized that the President has no Legislative powers except as he may veto legislation. Further that the Constitution has carefully distinguished the two powers of the executive, or administrative, and the legislative, one from the other and has held various regulations made by the President to be void under the Constitution.

6 Opinions Attorney General 10 (1853)
10 Opinions Attorney General 413 (1862)

In all civilized countries of the world there has been an age-long struggle between the Executive and the Legislature for supremacy. For centuries the history of the English people has been simply a story of the struggle between the King and Parliament for domination of the English Government, with the

authority of Parliament gradually gaining ascendency. This is simply one of the reflexes of the struggle of the people against Absolutism and each victory gained for Parliament has been one more step in the progress towards Democracy. This feeling against immense power being placed in the hands of the Executive was reflected in our National Constitution, which provides for a President with limited powers and having the same amount of authority continuing so long as that instrument remains unchanged.

There are, however, many in this country who look upon the relative powers of the various departments of government as something to be determined by the amount of influence a given department may exert over the others rather than by the Constitution, and especially is this true of the Executive. One authority states that "the presidency has been one thing at one time, another at another, varying with the man who occupied the office." "The office was one thing from 1789 to 1825 when English precedents and traditions were strongest, and another thing during Jackson's time when he worked his own will with or without sanction of law and still another thing from 1836 to 1861 when the Presidents lacked personal force to dominate the other branches of government, and yet another when Lincoln "seemed for a little while to become the whole government."

Woodrow Wilson—Constitutional Government pp 57, 58.

This same authority in discussing the authority of the President said,

"The makers of the Constitution seem to have thought of the President as what the sterner Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of the law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it."

Ibid pp 59, 60.

While we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of Constitutional principle."

Ibid pp 59.

The fact that there is a danger, under practically any form of Constitutional government of a man of blood and iron or of great military genius overthrowing the authority of the legislature and taking over to himself most of the prerogatives of the government, is admitted by Bryce, the greatest English authority on the American Constitution, when he says that Julius Ceaser was more than a match for the Senate, Cromwell for the Long Parliament, Louis Napoleon for the French Assembly of 1851, and when the President happens to be a strong man, resolute, prudent and popular, he may well hope to prevail against a body which he may divide by a dexterous use of patronage or otherwise.

American Commonwealth pp 165.

During the short period of our National existence

there have been many intense struggles fought out upon the floor of Congress to maintain the integrity of our National Constitution. It has been assailed from many sources and for many purposes, but during this whole time it has never had a stauncher supporter or a more able exponent than Daniel Webster, who, although in the minority at times, consistently opposed what he considered unconstitutional usurpation of power by the President and equally unconstitutional acts of Congress in granting the President powers that appeared to be legislative. In discussing the Fortification Bill of 1835 which provided for the appropriation of $3,000,000 for military and naval services to be expended under the DIRECTION of the President he said,

> "The honorable member from Ohio, near me, has said, that if the enemy had been on our shores he would not have agreed to this vote, and I say, if the proposition were now before us, and the guns of the enemy were pointed against the walls of the Capitol, I would not agree to it. The people of this country have an interest, a property, an inheritance in this instrument, against the value of which forty capitols do not weigh the twentieth part of one poor scruple. . . . For my part, I am content to show France that we are prepared to maintain our just rights against her by the exertion of our power when need be, according to the form of our own constitution; that, if we make war, we will make it constitutionally; and that we will trust all our interests, both in peace and war, to what the intelligence and the strength of the country may do for them, without breaking down or endangering the fabric of our free institutions."
>
> Works of Daniel Webster Volume IV, pp 226, 228.

While it is true that the courts have recognized

the right of Congress to authorize the working out of details by the Executive Department, it has only been where these details were considered to be administrative acts rather than legislative. However, in this Act of May 18, 1917, we find that its purpose is "to AUTHORIZE the President to increase temporarily the military establishment of the United States." No where in the Act is there any provision for raising a single additional unit or a member of any portion of the army. The preamble states "that in view of the existing emergency, which demands the raising of troops in addition to those now available," and then proceeds to fail to provide for the raising of a single additional man, unless the President so desires. By this act Congress declares that the situation is such that additional troops should be raised and then proceeds to authorize the President to say whether any troops shall be raised and, if so, whether they shall be raised by additions to the Regular Army, the calling out of the National Guard, the conscripting of men from the unorganized militia, or by voluntary enlistment. Such an act the plaintiff in error contends to be clearly the delegation of legislative powers to the President.

V.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of the fifth Amendment of the Constitution in that it subjects citizens of the United States to deprivations of life or liberty without due process of law, since it assumes to confer upon the President of the United States discretion-

ary and arbitrary powers in the selection of citizens into the draft army. This Court has repeatedly commented upon the acts of Congress which tend to take away the rights of the people under various guises. This attitude was well stated by the court in the case of Boyd vs. U. S. when he said that

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed, a close and literal construction deprives them of half of their efficiency, and leads to gradual depreciation of the rights as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon."
>
> 116 U. S. 635.

These words of the learned judge have been quoted approvingly in several cases since that time.

In Re Debs 158 U. S. 594.

Gulf, Colorado & Santa Fe Ry. vs. Ellis 165 U. S. 154.

Fairbanks vs. U. S. 181 U. S. 301.

Brown vs. Walker 161 U. S. 617-635.

U. S. vs. Wong Kim Ark. 169 U. S. 654.

There can be but little dispute but that a person who becomes a member of the army loses his liberty or at least a large portion of it, but an army organized upon any other theory would have but a small degree of efficiency. This fact is well stated by Mr. Justice Brown in the case of U. S. vs. Clark when he says,

> "To insure efficiency, an army must be to a

> certain extent, a despotism. Each officer, from the General to the Corporal, is invested with an arbitrary power over those beneath him and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence."
>
> 31 Fed. 710.

When a man enlists in the regular army or the National Guard, he agrees to accept this new status so that there is no infringement upon his liberty. Under the provisions of this Act of May 18, 1917 this plaintiff in error is to be taken and forced into the National Army on the decision of a person or persons appointed by the Governor of Minnesota and the Mayor of the City of St. Paul; forced to leave his business, to lose the right to support his family, lose his character as a citizen, his franchise, his civil right of a jury trial, the right to a trial in the civil courts, and his rights to the protection of the laws of the land. Can the deprivation of liberty mean more than this, and yet, under the National Constitution, the State or its officials have no right to raise an army.

It is evident from a careful reading of the Act approved May 18, 1917 that Congress recognized the fact that it was doubtful whether under ordinary circumstances and conditions of the nation it had the authority to pass such an act. This is shown by the preamble which gives the reason for the passage of the act in which it says "that in view of the exist-

ing emergency," and there is also a repeated reference to the 'existing emergency' throughout the various sections of the act. But the fact remains that an "existing emergency," either real or fancied, is no reason for the passage of a law which in itself is unconstitutional. This theory has been set aside for all time under the decision of this Court in the case of Ex Parte Milligan, a case growing out of the conditions of the time when this country was facing the most serious 'emergency' that has developed durin our history, and in that case this Court said.

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."
> 4 Wall 2, 142.

An "emergency" may be the basis and excuse for the passage of a law by Congress, but never the basis or reason for a decision or opinion of this court. Exercise of a power enjoyed by Congress is permitted as is of course, but 'emergency' as a reason for its constitutionality, is utterly unsound. Congress or the Executive through one cause or another may not be able or willing to find and use constitutional means to cope with a supposed existing emergency, but that does not signify it is not there, it only signifies they have been unable to find one, or are unwilling to use one that is known. The people are the ultimate authority is such a case, and if an emergency in fact exists, which cannot be reached under the Constitu-

tion, it can be met under the power of the Amendment as provided by Article 5 of the Amendments to the Constitution. In the past we have met great domestic crises and upheavals, and foreign dangers from which the people, through Congressional action, apparently for the time being, were unable to find immediate Constitutional means of relief; however, when the courts have refused to sanction the unconstitutional means proposed, Congress has been able to meet the situation, when necessary, with means that were Constitutional. For over one hundred years we have found the Constitution ample to meet every emergency and today the present emergency can be met without any encroachment upon either letter or spirit of that instrument—our fundamental law, but the Act approved May 18, 1917 violates both.

In conclusion this Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations prescribed thereunder are null and void in that Congress has no power under the National Constitution to raise an army by conscription. This fact is emphasized by the fact of the hostile attitude of the people of England and the American Colonies, during the 18th century, toward a standing army; and by the further fact of limiting the authority of Congress over the most important military force of that time—the militia.

This Act being an attempt by the federal government to raise an army by conscription, is in violation of both the letter and spirit of the Constitution, in that it is an attempt to force the members of the militia into the national army by means other than that prescribed by that instrument. The rights of the

members of the militia to be officered and trained by the States, as granted them by the Constitution, are denied and overridden by the provisions of this Act. Furthermore, since none of the conditions under which Congress can call forth of the militia exist, the militia, both organized and unorganized, could not be called forth either by Congress or the President, even though the act provided for the proper method of doing so.

However, if Congress had the authority to raise an army by conscription, this right was lost by the adoption of the XIII Amendment to the Constitution which prohibits involuntary servitude except as a punishment for crime.

If by any possible interpretation of the Constitution, Congress has authority to raise an army by conscription, it is clear that that authority can not be delegated to the President or any other administrative officer of the United States or of the States, yet the Act in question, makes no provision for raising an army, but authorizes the President, in his discretion, to provide for raising whatever forces he desires and in the manner in which he wishes. We urge that such a delegation of power comes within the inhibition of the Constitution.

Furthermore, by the provisions of this Act, various state officials are required to engage in the raising of an army under the direction of the President, and for failure or refusal to obey the dictates of the President are liable to arrest and imprisonment. This plaintiff in error is drafted by state officials into the national army while the Constitution prohibits the raising of such an army by the States. Also this

compulsion upon officials of the States destroys the sovereignty of the States in that sphere where they are supreme and breaks down the integrity of republican principles in their government.

By this Act this plaintiff in error is to be deprived of his liberty and possibly of his life without due process of law, and, upon the whim of a state official or an appointee of a state official, ordered into the conscript army, but without the rights reserved to him, as a member of the militia, under the Constitution and the laws of the land.

For these reasons Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations of the President prescribed thereunder be declared null and void.

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Frank Healy

Attorneys for Plaintiff in Error.

NO. 665

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1917

OTTO WANGERIN, Plaintiff in Error
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
HONORABLE PAGE MORRIS,
Presiding Judge.

T. E. LATIMER,
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No. 665

IN THE SUPREME COURT OF THE UNITED STATES

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STATEMENT.

The Plaintiff in Error was tried and convicted at the June A. D., 1917, Term of the United States District Court for the District of Minnesota, Third Division, of violation of Section Five of the Act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

The Indictment contains one count charging the plaintiff in error did wrongfully and unlawfully, wilfully fail and refuse to register, and present himself for registration as required by said Act, Proclamation and Regulations.

A demurrer was filed to said indictment in which plaintiff in error demurred upon the following grounds, to-wit:—1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the Thirteenth Amendment of the Constitutionn of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section One of Article One, and Section Eight of Article One, of the Constitution of the United States of America, and therefore null and void.

This demurrer was overruled and the plaintiff in error duly excepted thereto, whereupon the case was set for trial July 2d, 1917, at which time he was tried, the jury returned a verdict of "guilty", and the plaintiff in error was sentenced by the Court to serve one year in the Minnesota State Reformatory.

SPECIFICATIONS OF ERROR.

The District Court of the United States for the District of Minnesota erred in overruling the demurrer of defendant.

BRIEF.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are

in conflict with the terms and provisions of Section 8, Article 1, of the Constitution of the United States.

Rhode Island vs. Massachusetts 12 Peters 657
Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429
Martin vs. Hunter 1 Wheaton 304
3 Annals of 13th Congress 807
Kneedler vs. Lane 45 Pa. 238

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations perscribed thereunder is in conflict with the terms and provisions of the 13th amendment of the Constitution of the United States which prohibits involuntary servitude.

The Slaughter-House cases 16 Wallace 36
Civil Rights cases 109 U. S. 3
Ex Parte Wilson 114 U. S. 3
Plessy vs. Fergurson 163 U. S. 537
Robertson vs. Baldwin 165 U. S. 276
Clyatt vs. U. S. 197 U. S. 207
Hodges vs. U. S. 203 U. S. 1
Baily vs Alabama 219 U. S. 219
Butler vs. Perry 240 U. S. 328
U. S. vs. Sanges 48 Fed. 78
State vs. West 42 Minn. 47

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1, and Section 8, Article 1, of the Constitution of the United States in that congress attempts to delegate legislative power to the President of the

U. S. and other United States or state officials.

Stoutenburg vs. Hennick 129 U. S. 141

Field vs. Clark 143 U. S. 649, 692

U. S. vs. Blasingame 146 Fed. 654

U. S. vs. Keokuk etc. Bridge Co. 45 Fed. 178

Cooley, Constitutional Limitations Chap 5 P 137

Cooley, General Constitutional Principles of Law P 87

6 Opinions Atty. Gen. of U. S. 10

10 Opinions Atty. Gen. of U. S. 413

Bryce, American Commonwealth P 165

Wilson, Constitutional Government P 57, 58, 59

Webster's Works

The Federalist Chap. 69 P. 515

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4, Article 4, of the Constitution of the United States, and Article 10 of Amendments to the Constitution of the United States in that Congress attempts to require state officials to do that which is prohibited to the States themselves.

Collector vs. Day 1 Wallace 124, 126

McCulloch vs. Maryland 4 Wheaton 405

Dred Scott vs. Sanford 19 Howard 401

Worcester vs. Georgia 6 Peters 570

Kohl vs. U. S. 91 U. S. 372

U. S. vs. Reese 92 U. S. 214

U. S. vs. Harris 106 U. S. 629

Martin et al vs. the Lessee of Waddell 16 Peters 410, 416

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Article V of Amendments to the Constitution of the United States providing that "nor shall any person be deprived of his life, liberty or property without due process of law."

In re Debs 158 U. S. 594
Boyd vs. U. S. 116 U. S. 635
Gulf Colo. & Santa Fe Ry. vs. Ellis 165 U. S. 154
Fairbanks vs. U. S. 181 U. S. 301

ARGUMENT.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of paragraphs 12 & 14 of Section 8, Article 1 of the Constitution of the United States in that Congress is attempting to raise an army by conscription.

In arriving at a proper interpretation of various sections of the Constitution this Court has had recourse in the past to an inquiry as to the state of things existing at the time of the adoption of the Constitution, and also a search of the contemporary history of that time.

Rhode Island vs. Massachusetts 12 Peters 657
Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

At the time our Federal Constitution was adopted there were two kinds of military service recognized

in the English speaking world—the militia and the **standing army**.

In the days of the Saxon Kings the militia in England was organized by counties for defence of the realm. This organization survived the Norman conquest in similar form and for similar purpose. Stubb's Select Charters P 153, 154. But Wm. the Conqueror brought with him to England an army composed of feudal and mercenary soldiers and thus planted on English soil a new military organization known as the standing army.

There was great hostility in England toward this army which resulted in many attempts to reduce its size and cripple its strength. It was entirely disbanded during the rule of Cromwell, but again revised and enlarged, and used by the later Stuarts as well as the Tudors as a means or oppression. One of the grievances set forth in the Petition of Rights in 1628 was the oppressive use of the standing army by the King. Appendix Stubb's Select Charters.

This was later expressed in the Bill of Rights offered in Parliament in 1689. One of the accusations against the King being that of "raising and keeping a standing army within his Kingdom in time of peace, without the consent of Parliament, and quartering soldiers contrary to Law. Statute of Realm pp. 142, 145.

Notwithstanding their hatred of the standing army and hostility to its command by the King the fear of invasion from the continent impressed upon them the need for such a military force. This situation was met by Parliament passing the Mutiny Act of 1689 and an act for the restriction of the grant of

revenues. Thus the discipline of the army and the grant of its supplies were made entirely dependent upon the will of Parliament. Since that time the Parliament has renewed this statute annually.—Macy —The English Constitution P 335.

Attempts were made by the Tudor Kings to raise an army by conscription and later a similar attempt by the Stuarts but without success, and until the Revolution of 1688 the British army was composed of mercenary and feudal soldiers. After the Revolution of 1688 several attempts were made in Parliament to provide for the raising of an army by conscription, but the only act applying to conscription that was passed by Parliament before the adoption of our Federal Constitution was passed in 1704, and provided among other things to

> "levy and raise all able bodied, idle and disorderly persons, who can not, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their support and maintenance, to serve his majesty as a soldier."—The Statute 4 Ann Chapter 10.

Later acts of Parliament contained similar provisions, but all attempts to extend conscription to other persons failed.

Statute 29 George II Chapter 4 (1755) 30 George II Chapter 8 (1757) 18 George III Chapter 53 (1778) 19 George III Chapter 10 (1779).

From these facts it may be seen that only paupers and vagabonds could be conscripted into the standing army in England; that no person who could vote for members of Parliament could be conscripted, and to all intents and purposes the membership of

the British army was based upon voluntary service. This fact was emphasized during our War of the Revolution when the Whigs were opposed to the war and the English King was compelled to hire Hessians and others from the continent to make up the English forces fighting against the colonies.

That this feeling against standing armies prevailed in America at the time of the Constitutional Convention of 1787 and especially among the delegates to that Convention is shown by the provision in Section 8, Article 1 of the Constitution of the United States which provides "but no appropriation of money to that use shall be for longer time than two years". The opposition to the raising and control of an army by the president is shown by the provisions of that section which gives to Congress power" to make rules for the government and regulation of the land and naval forces".

That Congress has recognized that it was the intention of the authors of the Federal Constitution to provide for the raising of the Regular Army by volunteer enlistment is shown by one hundred and twenty-seven years of national legislation. During all that time the subject of raising an army by conscription has been discussed in Congress only twice—once in 1814 when a bill providing for the raising of an army by conscription was introduced in Congress at the request of the Secretary of War but failed of being enacted into law. Daniel Webster perhaps the greatest expounder of the Constitution, opposed this measure upon the ground that it was in contravention of the terms and provisions of the Constitution of the United States.

In opposing this measure he said,

> "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, for the general purposes of the war, under the color of a military service...
>
> That measures of this nature should be debated at all, in the councils of a free government, is a cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form....
>
> The administration asserts the right to fill the ranks of the Regular Army by compulsion. It contends that it may now take one out of every twenty-five men, and any part or whole of the rest, whenever its occasions require. Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defense or for invasion, according to the will and pleasures of the government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.
>
> Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty?
>
> Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious

and mischievous government may require it?

In granting Congress the power to raise armies the People have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the People themselves and they have granted no others. To talk about the unlimited power of the government over the means to execute its authority is to hold a language which is true only in regard to despotism. The tyranny of Arbitrary Government consists as much in its means as in its ends, and it would be a ridiculous and absurd constitution which should be less cautious to grant against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction, a free government without adequate provisions for personal security is an absurdity, a free government with an uncontrolled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered into the head of man."

Van Tyne, The Letters of Daniel Webster.

The question of raising an Army by conscription was again discussed by Congress in 1863 and a Conscription Act was passed by both Houses of Congress and signed by the President. 12 U. S. Statutes at Large 731.

The question of the constitutionality of this act was not determined by the Federal Courts. The only case before the courts in which the constitutionality of this act was considered and determined was in the State Court of Pennsylvania. In the case of Kneedler vs. Lane et al 45 Pa. St. 238 an injunction was sought against the officials entrusted with the duty of enrolling drafted men, to restrain them from

enrolling men in the drafted army on the ground that the Act was null and void and in violation of the provisions of the Constitution of the United States. The Court granted a preliminary injunction by a vote of three to two holding the Act unconstitutional. Later a new judge having been elected and qualified, this position of the Court was reversed and the Constitutionality of the Act upheld. Elaborate opinions were rendered by individual judges and some of the conclusions appear pertinent at the present time. Chief Justice Lowrie urged that if Congress had the right to raise an Army by conscription that this would subject all social, civil and military organizations of the States to the Federal power of raising armies and that nothing would be left that had any constitutional right to stand before the will of the Federal Government. Kneedler vs. Lane Supra pp. 246.

Another fact that was emphasized is that in all cases of forced contribution to the National Government allowed by the Constitution, such as duties, imposts, excises and direct taxes there was fixed the rule of uniformity, equality or proportion. That nowhere in the Federal Constitution is there any reference to forced contribution to the Army or any rules for such contribution as is provided in all other such cases. Kneedler vs. Lane Supra 242.

Judge Woodward calls attention to the fact that a careful study of the Constitution itself shows that there is no intention to authorize the raising of an Army by conscription and sets forth the 16th and 17th paragraphs of Section 8, Article 1 of the Federal Constitution in support of his contention. Kneedler

vs. Lane Supra pp. 256-257.

By the Act of Congress approved May 18, 1917, the first paragraph of Section 1, authorizes the President to raise and organize — — — such a number of increments of the regular army provided by the National Defense Act approved June 3, 1916, or such part thereof as he may deem necessary. This National Defense Act provides that

> "the army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now, or may hereafter be, authorized by the law."

Section 2 of said National Defense Act provides that the regular army shall consist of officers and enlisted men. Section 27 of such act provides that after November 1st, 1916 all enlistments in the regular army shall be for a term of seven years. Section 57 of said Act determines the composition of the Militia as follows:

> "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia."

Sections 69, 70 and 71 of said act provides for enlistment in the National Guard as follows:

> "Section 69—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three

years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Section 70:—Federal Enlistment Contract:—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligations the enlisted man shall not be recognized as a member of the National Guard until he shall have sgined an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this....day of..... 19...., as a soldier in the National Guard of the United States and of the State of....., for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of....., and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of....., and of the officers appointed over me according to law and the rules and articles of war."

"Section 71. Hereafter all men enlisting for service in the National Guard shall sign an en

listment contract and take and subscribe to the oath prescribed in the preceding section of this Act."

However, Section 2 of the Act of May 18, 1917 provides:

> That the enlisted men required to raise and maintain the organization of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and wherever the President decides that they can not effectually be so raised or maintained, then by selective draft."

Thus, for the first time in the history of this nation Congress attempts to provide for the raising of a regular army, an organization based upon voluntary enlistment, by conscription. These drafted men are to be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions of Section 8, Article 1, of the Constitution of the United States which specifically reserves to the States the authority of training the militia and the appointment of officers.

The third paragraph of Section 1 of the Act of Congress adopted May 18, 1917 authorizes the President

> "to raise by draft as herein provided, organize and equip an additional force of 500,000 enlisted men, or such part or parts thereof, as he may deem necessary."

Section 2 of said Act provides that

> "all other forces hereby authorized except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training

> cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act."

Section 5 of the same Act provides that

> "all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act. Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

By these provisions men between the ages of twenty-one and thirty, not otherwise exempted, among them the plaintiff in error, are to be taken from the group that Congress has designated as unorganized Militia and placed in the Regular Army, National Guard and Drafted Army at the will of the President in violation of the provisions of the Federal Constitution which refer to the militia as follows:—

> "Congress has power — — — to provide for the calling forth of the militia to execute the laws of the Union, to suppress insurrections and repel invasions; to provide for the organizing, arming and disciplining of the militia, and for the governing of such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

By the provisions of the Act of May 18, 1917, the appointment of officers and the authority of training the militia are placed in the hands of Federal Authorities, thus taking away the rights of these members of the unorganized militia which is specifically granted them by the Constitution.

Furthermore, these men who are members of the unorganized militia are not called forth to execute the laws of the Union. Congress, the President, the War Department nor any other authority contends that this army is being called forth for this purpose. The civil authorities are well able to execute the laws of the Union. There has been no need for any portion of the National Military Forces to be called forth to suppress insurrections, either now existing or likely to exist in the future, and the emergency set forth in said Act does not refer to insurrections. Also there is no foreign foe on our soil who is to be repelled nor is there any body of foreign troops quartered in the vicinity of our soil from whom an invasion is imminent. The existing emergency referred to in the Preamble of said law and in the several sections thereof is not due to the inability of this Government to "execute the laws of the Union".

out the Militia to the three instances enumerated in

It may be pertinent to call attention to the fact that the "existing emergency" repeatedly referred to in the Act of May 18, 1917 grows out of a declaration of Congress that a state of war exists between this country and Germany and from said emergency there has developed no failure to execute laws, no insurrections and no invasions of our soil, but already a portion of the Regular Army of the United States is in France. Members of the National Guard are on the way to Eastern Ports of embarkation, cantonments have been built for the training and housing of the first draftetd army, and preparations are being made for the call of the second drafted army. as provided in paragraph 4, Section 1, of the act of May 18,1917. Instead of being called forth to repel invasion, our military forces including the National Guard and the unorganized Militia are being ordered across the Atlantic Ocean, there to engage in warfare three thousand miles from our soil, and Congress has authorized the President to authorize the Governor to authorize the Mayor to authorize the Local Exemption Board to call forth this plaintiff in error, a member of the unorganized militia to engage in this warfare.

During the whole history of the English speaking people, no such power has been exercised by the national, Legislature or Executive except as applied to paupers and vagabonds, and the attempted usurpation of said power was one of the contributing causes of the downfall of the Stuarts.

It may be well to examine the status of the Military system of England from which was developed the Militia of the Colonies, the early States, and later of

the United States. From the earliest time the militia has existed in England as a local force for defense. Stubbs Select Charters pp. 163 and 164. By statutes of Edward III, Chapter 2, and 4 Henry IV Chapter 13 the members of militia could not be compelled to go out of their Shires; by Statute 25 Edward III Chapter 8, and 26, George III Chapter 107 the members of the militia could not be ordered out of their own country unless in case of urgent necessity certified to by Parliament, and could not be sent out of the Kingdom under any circumstances whatever. The last statute above mentioned was passed in 1786, only one year prior to the meeting of the Constitutional Convention in Philadelphia.

Mr. Dicey in the Law of the Constitution pp. 287-288 states that

> "the Militia is a Constitutional Force existing under the law of the land for the defense of the country—embodiment indeed converts the militia for the time being into a regular army, although an army which can not be required to serve abroad."

The members of the Constitutional Convention clearly recognized the English theory of a militia as a force for internal defense and definitely limited the power of Congress and the President over this military force as is shown by the provision in Section 8 of Article 1 of the Constitution, where the right of appointment of officers and the authority of training the militia is specifically reserved to the States and Congress was limited very definitely as to the conditions under which it could call for the militia. Furthermore, in Section 2, Article 2, of the Constitu-

tion the control of the President over the militia as Commander in Chief was specifically limited to the time "when called into actual service of the United States". The attitude of the people of that time is shown by the fact that after all these safeguards were thrown about the Militia in the shape of limitations on Congress and the President it was considered necessary in order to protect the interests of the people to include in one of the first ten amendments to the Constitution, known as the Bill of Rights, Article 2 of the Amendments of the Constitution of the United States as follows:—"A well regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The intention of the authors of our Constitution and the attitude of the people at the time of its adoption is emphasized by an instance occuring at the Constitutional Convention. The Committee of Detail reported the clause authorizing Congress to provide for the calling forth of the militia and among other provisions included that of to "enforce treaties". Gouverneur Morris moved to alter this clause by striking out the words "enforce treaties" and this was adopted by a vote of the Delegates. Journal of Congress pp. 454-594.

If there could be any doubt in the minds of anyone regarding the intent of the members of the Constitutional Convention as to the power which the Constitution granted to Congress and the President over the militia, this act of striking out the provision giving the power to Congress to call forth the militia to enforce treaties placed the Convention clearly on

record as limiting the power of Congress in calling the Constitution, all of which are for service at home and within the boundaries of the Nation. In an early case Mr. Justice Story in discussing the rights of Congress over the militia stated:

> "It is almost too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in the clauses; and that in all other respects and for all other purposes, the militia is subject to the control of the government of the State authorities."—Houston vs. Moore 5 Wheaton 1, 51.

In 1912 during the administration of President Taft it appeared that an emergency might arise and a greatly increased number of troops might be needed and the question of calling forth the militia to be used in foreign warfare was seriously considered, and an opinion regarding the rights of Federal authorities to call forth the militia in such an emergency was taken up with the Attorney General of the United States and he was requested by the Secretary of War to give an opinion on the subject. In accordance with this request Attorney General Wickersham gave an elaborate opinion and among other things said:

> Sir: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:
>
> "Whether or not, under existing laws, the President has authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?"
>
> It is certain that it is only upon one or more

of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term "to repel invasion".

Then, too, "if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling invasion."

"What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsory executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

"So that when an armed force is used to compel the observance of treaty obligations or to punish or obtain compensation for their violation there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

"These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or its Territories. In the history of this

provision of the Constitution there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government was intended as a distinct limitation upon their employment.

"The militia of the States, restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties or to protect the rights of the government or its citizens in those cases in which protection must be sought beyond the territorial limits of the country."

"I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative."

This opinion was accepted by the President who was himself a jurist of ability and a careful student of the Constitution. This opinion of the Attorney General is binding upon the Executive Department of the Government and it has been recognized as correct by the present Executive administration. President Wilson in an address delivered in New York

City on January 27, 1916 said,

> "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our National defense should be built up and encouraged to the utmost; but you know, gentlemen, that under the Constitution of the United States the National Guard is under the direction of more than two score States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of actual invasion has the Presiden of the United States the right to ask those men to leave their respective States."

He later made similar addresses at Cleveland, Ohio on January 29, 1916, at Milwaukee, Wisconsin on January 31, 1916 and at Topeka, Kansas on February 2, 1916.

New York Times Jan. 30th, 1916. Feb. 1st, 1916, Feb. 3rd, 1916.

The Act of May 18th is a violation of the 13th Amendment of our Constitution reading as follows:—

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The 13th amendment has been construed by this court in nine cases that are pertinent here as follows:—

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 417

Plessy vs. Ferguson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 275
Clyatt vs. U. S. 197 U. S. 207
Hodges vs. U. S. 203 U. S. 1
Bailey vs Alabama 219 U. S. 219
Butler vs. Perry 240 U. S. 328

The application of this Constitutional provision t
the case at bar involves the construction of the entir
amendment, possibly the definition of the wor
slavery, and an interpretation and construction of th
phrase involuntary servitude. We take up the las
of these first as being the more important.

The phrase involuntary servitude simply means
condition or status of compulsory service the cleares
applicable term to the service provided for in th
law.

Century Dictionary—Revised and enlarged Editio
Volume 8, Page 5519.

Oxford New English Dictionary—Servitude Vol.
Page 522.

Funk & Wagnall's Standard Dictionary—Servitud
Volume 8, Page 522.

Universal Dictionary of the English Language
Volume 4, Page 4213.

In the second and third of such authoritie
Military and naval service are cited as examples
such service that existed in India and in England i
the very early days.

Bouvier's Law Dictionary, Vol. 2, Servitude, 15
Edition.

Black's Law Dictionary, 2nd Ed. Page 656.

In State vs. West, 42 Minn. 47, Mr. Justice Mitche
says,

"There is nothing better settled than that e

forced labor is involuntary servitude within the meaning of such constitutional provisions.

This court has defined it as a condition of compulsory service in the Clyatt case supra page 215 and the Bailey case supra page 243.

The Robertson case supra in effect admits that military and naval service are within the letter of the inhibition of the 13th amendment.

The amendment prescribes that the condition of compulsory service shall not EXIST in this land, and is clearly self-executing, and by the use of the word EXIST it places its inhibition on every individual, and on the National Government as well as the states.

As an inhibition on the national government Robertson vs. Baldwin supra in a case involving the constitutionality of a natonal law condemned for permitting involuntary servitude classes the amendment with the Bill of rights as a limitation on the power of the Federal Government. Harlan, Judge in the dissenting opinion thereto pages 292-3 so classes it, citing the opinion of Mr. Justice Miller in the Civil Rights cases supra at page 20, paragraphs two and three. See also dissenting opinion to that case at page 35, paragraph 2. To the same effect see numerous and clear expressions of the court in the Plessy, Clyatt and Bailey cases supra.

Also U. S. vs. Sanges 48 Fed. 78

Black on Constitutional Law, 2nd Ed. Page 461

McClain on Constitutional Law says,

"Amendment XIII prohibiting slavery or involuntary servitude is applicable not only to the Federal Government, but also to state governments and to individuals as well."

We gather from the foregoing and urge here that thereby the inhibition condemns the practice of slavery, and involuntary servitude, whether the dominant one be either an individual, or the state or National governments, and as well condemns laws by such sovereignties permitting it or compelling it.

In support of this theory we wish to quote the late Justice Moody who as Attorney General ruled, Opinions A. G. Volume 25, Page 474, that the ordinance of the Panama Canal Commission amounting to an executive act of that department compelling laborers contracting with the commission for a term of service to complete their term would be involuntary servitude within the amendment. In short the executive department of the government cannot hold a person in at least that capacity in a condition of involuntary servitude.

Mr. Justice Moody says to the Secretary of War:—

> "I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you inform me that the executive committee of the Panama Commission desires me to formulate a series of rules and regulations the observance of which would enable that committee, in making contracts for the furnishing of labor, to avoid a condition of peonage under the authority of the United States. The word slavery as used in it is descriptive of the chattel slavery which once existed in this country. That any such condition would be established by any officer of the United States is so inconceivable that it need receive no attention. But the words involuntary servitude are much broader than slavery, and include within their meaning many forms of service which cannot properly be described as slavery."

On page 477 he says,

> "I have no hesitation in saying that any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude within the meaning of the Constitution."

On Page 481 he says,

> "I entertain no doubt that the condition described in this ordinance is that of involuntary servitude and not the less involuntary servitude because the contract of service in which the laborer submits to the conditions prescribed by the ordinance was entered into freely and voluntarily and under careful public supervision."

Further on page 482 he says,

> "In the employment of labor on the canal the utmost care should be taken to exclude the conditions which have been indicated as those of involuntary servitude or any other conditions of like effect and tendency. This care should be exercised not only in making the contracts to which the UNITED STATES IS A PARTY, but in scrutinizing the contracts, usages and practices between those who agree to furnish contract labor to the United States and the laborers themselves."

Thus we see that there is substantial authority to the effect that forms of slavery and involuntary servitude practiced by the National Government as a master and laws by it permitting or compelling the condition are unconstitutional. We think too, that the national feeling which forced the 13th amendment clearly shows this through the passage and repeal of various laws such as the various compulsory road laws, and the repeal of the seaman law in controversy in the Robertson case and others to like effect. In practically the only case going into the subject of the compulsory road laws cited in the Butler case supra,

and upon which is based that of Dasler vs. Kansas, the law was vehemently attacked as a minor, subtle entering wedge for the return of forms of slavery to the state, and the court said in passing on it, that we could deal with the more flagrant forms when we came to them. The road laws were accepted as means of organization only, because the service would have been cheerfully rendered without it, as it is in all states of the Union today.

A return to compulsory military service would be a distinct return to the principles of feudalism, and particularly and clearly to that form known as vassalage, denounced by Mr. Justice Field in his dissenting opinion in the Slaughter-House cases supra at Page 69, as within the amendment and in the same class with peonage, serfage, villeinage and etc. Vassalage is herein otherwise treated, but we think we ought to recall the court's attention here to the fact that the essence of it was compulsory military service to the King or Lord, in return for protection and tenure of land.

We find in Henry Wilson's Rise and Fall of the Slave Power in America, Volume 2, Page 60, that the southern states themselves sold slaves on the block at auction. And under such circumstances we have no doubt that the states themselves, through escheat or otherwise, held slaves as did the governments of ancient Greece and Rome. Does anybody doubt that the 13th Amendment inhibited such practices, and such practice by the National Government as Justice Moody says.

The government may regulate the right to quit to such limited extent as does not en-

croach on the spirit of the prohibition protecting the laborer and soldier's liberty which will under ordinary conditions prevent a disorganization of the system. If the state could compel its citizens to labor on the canal, it could compel them to build another Appian way, and the Pyramids. It is true that under most any situation, such action by a government elected by the people is unthinkable, but no one can gainsay the fact that peculiar unsettled conditions among the electorate may produce a despotic government, in which case for at least two years, the Constitution is our only protection.

In Missouri the courts decided in In Re Thompson 117 Mo. 83 that a law authorizing Justice of the Peace to empower the sheriff to hire out vagrants for a period of six months for cash was held involuntary servitude within the 13th amendment. This well illustrates how our country's Constitution has developed and improved on the English Constitution as it was when ours was adopted as to involuntary public service, when compared to the compulsory service of vagrants only in the English army and navy of that time, herein otherwise noted. As otherwise shown compulsory military service generally, was unconstitutional in England at that time and for many years prior thereto.

Every evidence from the language of the amendment itself, and from a history of the character of the times, leads to the conclusion that it is to be contsrued in its broadest sense.

Mr. Justice Field in Slaughter-House cases supra page 90, says:

"Still it is evident that the language of the

> amendment is not used in any restrictive sense. It is universal in its application."

The use of the disjunctives "neither" and "nor" disassociate "slavery" and "involuntary servitude" and render them independent of each other.

The amendment in itself, says Mr. Justice Brown in Robertson vs. Baldwin supra, makes no distinction between public and private service. Would it not follow ordinarily that there was none intended?

The amendment itself makes one exception, that of compulsory service for crime. The inference is to be drawn that there were no others, and that if any were intended they would have been stated. Clearly above any others, no public servitude was intended to be excepted, as service for crime being a public servitude, in which the state is the dominant and the criminal the servient factor, is expressly excepted from its operation, leaving the inference that no others of that class were intended to be excepted. In plain words the only act of sovereignty in which compulsory service is permitted is service for crime.

2 Story on Constitutional Law, Section 1924 says:

> "The 13th amendment forbids not merely the slavery known to our laws, but all kinds of involuntary servitude not imposed in punishment of a public offense.

If the government's theory and contention is correct that all public service, or any compulsory service that the public wishes to impose, or has in the past imposed, is a general exception to the language of the amendment, then the only expressed exception is of no value whatever, and is to be treated as surplusage, and might as well have been eradicated

therefrom by the framers. This court in the past has not been given to such a construction. Under the exception in the language, the state may hold a man to compulsory service for crime.

The amendment in lieu of many other possible words and phrases to express a prohibition uses the drastic phrase and word "shall not exist", clearly making the provision self-executing, denouncing a condition or status, by whomsoever created or maintained, be it individual, corporation, state or Nation.

This court as jealously guards the many and inalienable rights of the people, as it has recently jealously upheld the plenary powers of the government.

The high pitch of the public nerves at the time the amendment was adopted, by reason of the war, the draft act and the riots incident thereto, and many like and subsidary incidents, attest the mood of the public, and its desire and intent for sweeping changes in policy. The fact that the draft act directly preceded the 13th amendment, that it was clearly in the minds of the public, that it engendered terrific opposition, that such an act had theretofore been considered unconstitutional, and the fact that a constitutional amendment prohibiting involuntary servitude, would cover every form of compulsory service, including service to the public, and the legislature in voting on such an amendment would so construe it and believe they were covering this class of service as well as any other, is added reason to give effect to their votes. Today if we were to prohibit by another amendment just such service, we could use no better language considering the broad general language in such instruments than

to repeat the language of the 13th amendment as it now is.

It seems to us that conscription was so clearly in the mind of the public and all bodies proposing or voting on the instrument, that had they intended to make an exception of compulsory military service, they would have done so in the amendment. Instead they make but one exception, involuntary servitude being permitted to the government in cases of conviction for crime. If the English language has even an approximately definite meaning we must say that the framers of the 13th amendment by making one definite exception meant to exclude all other forms of slavery or involuntary servitude.

A number of forms of service which are apparently comparable to military service and are public services or otherwise sanctioned by usage, and have survived for such reasons, has been called to our attention by the cases, and we herewith list them in somewhat the order of their strength with military service, for the purpose of commenting on same. Military service—service on roads—jury service—service as a witness—service in posse of sheriff—service of sailor—service of apprentice to master—service of child and ward to parent and guardian—power of legislature to punish abandonment of labor in extreme cases—compulsory education—service in the pest-house. The involuntary servitude of a sailor that was held constitutional in the Robertson case, has been abolished by Sections 8304-13 U. S. Compiled Statutes. Neither is compulsory service of an apprentice to a master tolerated here now. Both of these however were non-public ser-

vices but they show how the so-called exceptional cases are going. The Compulsory Road Laws as Justice McReynolds in the Butler case says were at one time in effect in thirty-eight states of the Union but are now in effect in seven states, possibly only five and these all southern states that have not progressed as fast as the balance of the states. Official Good Roads Book United States—Published by American Highway Association at Page 67—Local Revenues and Labor Taxes and the statutes of the states herein cited. One thing is true of this service, as that of Jury, witness and posse service, that the service generally would have been cheerfully rendered without the law. The compulsory feature was simply a more efficient means of perfecting an organization to which few objected later. Jury service and compulsory process for witnesses however, are by express provision provided for in the Constitution. Service of child and ward to parent and guardian, compulsory education and service in the pest-house are not compulsary service in any sense but a mere regulation of liberty not amounting to a deprivation and on the same plane as the well-known limitations on the right of free speech and carrying weapons that do not amount to deprivations of the rights.

There is some dicta in the Robertson and Butler cases supra to the effect that the doctrine that compulsory military service was unconstitutional and incompatible with a free government was a novel doctrine at the time the 13th amendment was adopted, and that it was an exceptional service sanctioned by immemorial usage and needed no expressed exception in the amendment to be excepted from its operation

We need but to refer here to the history of military service as it relates to our laws and institutions and those upon which they are based and herein otherwise set forth and fully discussed to establish the fact that voluntary service was the only one tolerated, and that conscription or compulsory service was the novelty and unconstitutional. It was opposed and every possible guard placed against it at all times.

Under our articles of Confederation Congress had no power to raises armies but had to ask the states for quotas. Our Constitution itself was drawn and intended to perpetuate here all the liberties held by the citizens of England, and to perpetuate and establish more and greater liberties than existed in the mother country and prevent tyranny by the state.

Then followed the 13th amendment, which was in the words of this Court, a charter of universal freedom. Can it possibly be said that the unconstitutionality of Compulsory Military Service is a novel doctrine and that this sweeping provision establishing a principle rather than inhibiting particular cases does not cover it.

One ground for Judge Brown's decision in the Robertson case has been directly overruled by this court in Bailey vs. Alabama supra—That is that a service voluntary at the start by contract is in law voluntary during the period of the contract notwithstanding it is in fact involuntary at any time during the period.

The other ground for the decision, the one in point here, was very much mutilated by the dissenting opinion of Justice Harlan. His opinion was quoted approvingly by District Judge McPherson in Union Pacific Railway vs. Ruef 120 Federal 102-111.

Judge Brown did not have an exceptional public service to deal with, as did Judge McReynolds, it was simply an exceptional private service. The seaman's law in question has been long abolished by congress in strict conformity to what we think was the spirit coming from the 13th amendment and the times of its adoption, and we are sure the dangers that Judge Brown feared from such a rule as set out in his opinion have undoubtedly not been realized. Judge Harlan says in that opinion that public service is in no legal sense involuntary servitude. But that cannot lie considering the broad definition of the term laid down in the Clyatt and Bailey cases.

Judge Brown also classes the 13th amendment with the Bill of Rights and cites what he calls exceptions: A careful perusal thereof seems to us will show that such exception so-called would be mere regulations not amounting in any sense to a deprivation of the right.

In five cases cited in State vs. Wheeler, the 13th amendment was not raised and the same was true of Sawyer vs. Alton. That in Dennis vs. Simon the amendment was raised but not discussed, and the Canadian case could have no bearing anyway under our Constitution. Only Dassler vs. Kansas supports it, and the law and a decision on it were bitterly attacked as an entering wedge in a case of apparently no moment to be used as a basis for a decision in a case of tremendous moment which would amount to slavery to the state.

But in all of the above mentioned cases, which are apparently comparable to compulsory military service there is one elemental difference between them

and compulsory service. The servitor loses none of his rights as a citizen of the state wherein he resides or of the United States. He still has the right of suffrage, the right to be represented by an attorney, the protection of the civil laws, and in cases of transgression, the right to be tried by a jury under the provisions of the civil laws and to receive such punishment as provided by the civil laws. Furthermore the terms of service is temporary and definitely fixed by the laws and customs permitting the same.

In the case of military service, the servitor becomes a mere tool in the hands of his superiors. Except, where given that right by statue, which has been done in a very few states, he has lost the right of suffrage, he has lost the protection of the civil laws. He is bound by autocratic rules and regulations promulgated by the President, Congress, the War Department, and a host of immediate superiors and which are enforced according to the whim of the commanding officer. When he transgresses he is tried by court martial. He can have no attorney to present his facts and defend him, no jury to pass upon the evidence, and the kind and amount of punishment lies in the justice and mercy of his military judges. The Constitutional guarantee of the right of suffrage and the right of jury trial, the protection and duties of the civil laws afford him no relief. His paramount duty is to obey, blindly and implicitly the military commands and regulations, his only privileges are those granted by the superior military authorities and his only protection is the justice and mercy of his military judges.

True his term of service is at present fixed by sta-

tute, but with compulsory military service enforced, and the right of suffrage limited to a majority of those directly or indirectly benefited by compulsory military service and a great standing army, what guarantee is there that the term of such service will not be extended indefinitely or made a life service? What guarantee is there that we will not build up in this country a military caste and a military system that would make the German system appear an inefficient weakling?

Voluntary military service is based on a contract: but some of the cases seem to indicate that after the contract has been consummated it becomes more than a contract, that it becomes a status which binds the servitor in the service until the contract expires or is terminated by the consent of the parties.

Even if this be true we must admit that the status is based and must be based on a contract voluntarily entered into by the parties. If a status, involving the liberty, the very life and limb of the servitor can be created by law based on compulsion and force, then the whole structure work of republicanism crashes to the ground, and the liberties of the individual, hewn by centuries from the bodies of countless martyrs become a mirage. Conscription presupposes no voluntary contract of service, therefore no status has and can be created, the services rendered become an involuntary servitude such as is forbidden by the 13th Amendment. The English speaking people have always feared and abhored compulsory military service as a careful reading of their statutes, parliamentary debates and legal discussions will show. The draft act of the 60's was never passed upon by the

federal courts. Although passed in the midst of a great civil war, the conscript army so raised to be used in quelling an insurrection that meant the destruction of the very nation itself, the Act provoked riots and opposition from one end of the country to the other, altho the act was not rigidly enforced and permitted the drafted man to hire a substitute for a reasonable amount. The people still smarted from the sting of its lash, still bitterly resented a curtailment of their liberties and then their representatives, acting upon public demand, passed and made a part of the great national constitution the famous 13th Amendment, and in that Amendment its framers, with the Draft Act and its riots and opposition still fresh in their minds, pronounced, NEITHER slavery NOR involuntary servitude, except as a punishment for crime.... shall exist. Knowing the military history of their country and their mother country, knowing that a vast number of the population considered the draft Act unconstitutional, they used a few brief nouns having a definite meaning, the conjunctives 'neither, nor' and the transitive verb 'shall', and in that single terse command "neither slavery nor involuntary servitude.... shall exist," they inserted the one single exception, "except as a punishment for crime whereof the party shall have been duly convicted."

III

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4 of the Constitution of the United States and Article 10 of the

Amendments to the Constitution of the United States, in that Congress attempts to require the State officials to do that which is prohibited to the States themselves. Chief Justice Marshall in an early case has well stated the relation existing between the State and Federal Governments and in discussing this subject he said,

> "The powers exclusively given the Federal Government are limitations upon the State authorities but, with the exception of these limitations, the States are supreme and their sovereignty can be no more invaded by the action of the State Government than the action of the State Government can arrest or obstruct the course of National Power."
>
> Worcester vs. Georgia 6 Peters 570

The right of the Federal Government to interfere with the sovereignty of the State was raised in the case of Collector vs. Day. Congress having passed an Act providing for the raising of revenue by an income tax, one of the United States Collectors collected from Judge Day, a State Official, a tax on his salary which was paid under protest and an action brought to recover it. Mr. Justice Nelson in commenting on the Act said

> "The Federal Government and the States, although both existing within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limit of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States" and therefore it was held that the Federal Government could not tax the income of the State Officials since it would interfere with the

efficiency of the State Government. 11 Wallace 113, 124.

The Dual form of government existing in this country and the supremacy of each government within its own sphere, precluding the right of interference on the part of the other government within that sphere, has become well settled after a thorough discussion of this relationship in our courts by some of our greatest jurists.

United States against Railroad Company, 17 Wallace 322, 332.

McCulloch vs. Maryland 4 Wheaton 316—405.

Dred Scott vs. Sanford 19 Howard 401.

Kohl vs. United States 91 United States 367—372.

The courts have recognized that when the States had established their independence of Great Britain the powers which had existed in the King and Parliament were taken over by the people of the States and that later certain grants of this power was given to the Federal Government; but only to the extent of these grants are the States and the people limited in their powers. In the case of Martin et al vs. The Lessee of Vaddell the court said,

> "When the Revolution took place the people of each State became themselves sovereign." "When the people of New Jersey took possession of the reins of the government and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or Parliament, became immediately rightfully vested in the State."

16 Peters 410, 416.

The fact that one government is supreme in a given field does not permit it to use that as an excuse to

so exercise its powers as to interfere with the workings of the other as a separate government. In fact as far as the Federal Government is concerned the Constitution of the United States has made it a duty of Congress to guarantee to every State of the Union a republican form of government and this injunction of the Constitution applies to the acts of the Federal Government as well as to those of any foreign country.

In Martin vs. Hunter's Lessee the court said,

> "I am firmly pursuaded that the American people can no longer enjoy the blessings of a free government whenever the States Sovereignty shall be prostrated at the feet of the Federal Government."
>
> 1 Wheaton 363

In the case of Texas vs. White the court again emphasized this proposition and said,

> "Not only therefore, can there be no laws of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

In the light of these decisions and the provisions of the Act of May 18,1917 above quoted, it is difficult to realize that Congress would attempt to place on the Statute Books of this nation a law containing the provisions set forth in Section 6 of said Act which reads as follows:

> "All the officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or ap-

pointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct.....Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty:..... shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by courtmartial and suffer such punishment as a court-martial may direct."

In accordance with the provisions of said Act of May 18,1917, the President prescribed certain registration regulations, and Section 5 of said regulations after quoting in full Section 6 of said Act reads as follows:

"It will be found by an examination of these regulations which contain the President's directions to officers of the Nation, State, counties, and municipalities, and to other persons designated to perform duties in connection with the registration, that the President has directed specific duties to be performed by certain of such officers and that he has authorized the Governors of States and officers of counties and municipalities to employ certain persons as agencies in the execution of this act. Since the act prescribes the penalty of imprisonment (with no alternative of fine) for the failure or neglect of such officers and agencies to perform duties so prescribed by the President, every person charged with duties should carefully study the instructions in general, and in particular so much thereof as pertains to his own peculiar duties."

These regulations prescribe that the Governor of the State shall appoint the Registration Board in all Counties or similar divisions outside of cities of 30,000 population or over, that he shall notify such Boards of the date for Registration and of all their duties and direct the Sheriff in said Counties to appoint Registrars in each voting precinct. (Section 19.)

He shall direct the Mayor or similar official to appoint the Board of Registration in the case of cities of 30,000 or over. He shall see that all such appointments have been made. He shall notify the Wardens of Penitentiaries and other penal institutions that they shall register their inmates. (Section 20.)

He shall see that the proper Registration Booths are provided throughout the State. (Section 21.)

He shall distribute forms for registration to the penal institutions and to the Sheriffs and Mayors within the State where there is a deficiency in the supply of forms. (Section 23.)

He is required to speed up the work of registration. (Section 24.)

On the sixth day after the President's Proclamation he is required to report to the Provost Marshal General regarding the condition of the supply of forms and as to whether the organization is in readiness in his State. (Section 25.)

He is to receive the summaries of the county and city returns on the day after registration and shall consolidate these returns and telegraph the same to the Provost Marshal General. (Section 26.)

He shall later receive a complete summarization of the registration in the various counties and cities of the State and consolidate these and forward them to

the office of the Provost Marshal General by mail without delay. He shall also secure a list of persons who have rendered uncompensated service and consolidate these showing the names and addresses and forward them to the office of the Provost Marshal General without delay. (Section 28.)

The duty of the Mayor or similar officer in a city of 30,000 or over as set forth by the Registration Regulations are as follows: He shall appoint a Registration Board for approximately each 30,000 population. He shall collect, receive and forward all copies of the Registration cards and reports from his city and shall conduct all the correspondence for the Board of Registration in his city with the office of the Adjutant General. (Section 10.)

He shall instruct the officers within such cities to provide for Registration Booths and see that such booths are provided. (Section 21.)

He is to receive the forms for registration, verify the number sent him, notify the Governor that he has received the same and the condition of readiness in his city. (Section 23.)

On the sixth day after the President's Proclamation he will report to the Governor by telegram concerning the state of supply of forms and the appointment of Registrars. (Section 25.)

On the day after Registration he shall telegraph a summary of the city returns to the Governor. (Section 26.)

He shall prepare a complete summarization of the Registration in his city and report the same to the Governor by mail and shall furnish the Governor with a list of persons who have rendered uncompensated

service. (Section 28.)

He must furnish Registration Cards to the City Clerk and receive the Registration Cards from the sick and those temporarily absent and turn them over to the proper Registrars. (Section 35.)

The duties imposed upon Sheriffs of the various counties of each State by the Registration Regulations are similar to those imposed upon the Mayor.

Prosecuting Attorneys and City Attorneys are required to act as the legal advisors of the Registration Boards and Registrars and aid and advise in all matters touching Registration. (Section 15.)

City and County Clerks are required to furnish cards to the sick and non-resident persons, to certify to said cards and must familiarize themselves with the duties of the Registrars and instructions in order to answer all questions. (Section 32.)

After setting forth the above required duties on the part of the State, County and City Officials the Registration Regulations in Section 29 declares that:

> The foregoing are only the immediate duties of the governors and mayors of cities of 30,000 population or over in connection with the registration. For the further purposes of supervising the draft, the office and duties of the State organization are of ever-increasing importance, and it is the intention to decentralize the execution of the law and place its execution in each State in the hands of the governor and others named to perform certain duties.

Thus instead of Congress raising an army in accordance with the provisions of the National Constitution it has passed an act which requires the States through their Officials to raise armies under the supervision of the President and the War Department.

By the Constitution and laws of the various States, Governors, Sheriffs, Mayors, County and City Clerks and other County and State Officials are elected and have certain duties to perform. By this act of Congress and the regulations prescribed thereunder these State, County, and City Officials are required to take up the new duties imposed upon them by the Federal Government and if any one of them fail or refuse to perform these duties, he is liable to arrest by the United States Marshal to be tried in the Federal Courts and upon conviction to be sentenced to serve not more than one year. Their State duties are to give way to the orders of the National Executive and in all of these acts they are doing that which is forbidden to the State of which they are an official, to wit:—the raising of an Army.

In Collector vs. Day, supra, the Supreme Court of the United States held that the Federal Government could not tax the salaries of the State or County officials as that would interfere with the rights of the State to maintain its sovereignty. How much less may the State maintain its sovereignty if its officials are required to give of their time and services in carrying out the mandates of the Federal Government and upon their failure to do so shall be taken from their offices and incarcerated.

If any power outside of the State Government or its citizens can control the acts of the State officials, whether that power be a foreign prince or potentate, a United States Congress or President, then that State loses its republican form of government. If a State government is to continue its existence within the Nation, its officials must be free to exercise their

duties as laid down by the State Constitution and the laws enacted thereunder, unless in violation of the National Constitution, without interference from other sources claiming the power to control and dominate them as State Officials.

IV.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1 and Section 8, Article 1, of the Constitution of the United States in that Congress attempts to delegate legislative power to the President of the United States and other United States and State Officials, to raise an Army.

Section 1, Article 1 of the Constitution of the United States provides,

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8, Article 1 provides,

> "The Congress is to have the power: ..... to raise and support armies; .....to make rules for the government and regulation of the land and naval forces."

Section 2, Article II provides,

> "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."

The authority of the President over the army was discussed by some of the authors of the Federal Constitution after the Constitutional Convention adjourned, in one of a series of papers published to influence the States to adopt the Constitution, which

papers were later published in a volume known as "The Federalist." This particular paper was prepared by Alexander Hamilton and in it he compared the authority of the President over the Army and Militia with that of the King of England and the Governor of New York. Among other things he said,

> "The most material points of difference are these: First, the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain, and the Governor of New York have at all times the entire command of all the militia within their respective jurisdictions: Second, The President is to be Commander-in-chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British King extends to the declaring of war, and the raising and regulating of fleets and armies."—The Federalist, Chapter LXIX pp 343.

Another eminent authority on the Constitution of the United States has said that

> "a settled maxim in Constitutional law is that the power conferred upon the Legislature to make the laws can not be delegated by that department to any other body or authority."—Cooley General Principles of Constitutional Law, pp87.

In the case of Field vs. Clark 143 U. S. 649,692 the court stated,

> "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government organized by the Constitution."

In applying these principles the Federal Courts have held that Congress cannot authorize the Secretary of the Interior to make provisions or protection against destruction by fire and depredation upon the public forest reservations and provide for the punishment for violation of said law or regulations of the Secretary.

U. S. vs. Blasingame 116 Fed. 654.

Also that Congress cannot delegate to the Secretary of War the power to determine whether a bridge lawfully constructed is an obstruction and must be removed.

U. S. vs. Keokuk etc. Bridge Company 45 Fed. 178.

The authority of the President over the army and navy has been made a subject of ruling by the Attorney General of the United States from time to time and in those opinions the fact has been emphasized that the President has no Legislative powers except as he may veto legislation. Further that the Constitution has carefully distinguished the two powers of the executive, or administrative, and the legislative, one from the other and has held various regulations made by the President to be void under the Constitution.

6 Opinions Attorney General 10 (1853)
10 Opinions Attorney General 413 (1862)

In all civilized countries of the world there has been an age-long struggle between the Executive and the Legislature for supremacy. For centuries the history of the English people has been simply a story of the struggle between the King and Parliament for domination of the English Government, with the

authority of Parliament gradually gaining ascendency. This is simply one of the reflexes of the struggle of the people against Absolutism and each victory gained for Parliament has been one more step in the progress towards Democracy. This feeling against immense power being placed in the hands of the Executive was reflected in our National Constitution, which provides for a President with limited powers and having the same amount of authority continuing so long as that instrument remains unchanged.

There are, however, many in this country who look upon the relative powers of the various departments of government as something to be determined by the amount of influence a given department may exert over the others rather than by the Constitution, and especially is this true of the Executive. One authority states that "the presidency has been one thing at one time, another at another, varying with the man who occupied the office." "The office was one thing from 1789 to 1825 when English precedents and traditions were strongest, and another thing during Jackson's time when he worked his own will with or without sanction of law and still another thing from 1836 to 1861 when the Presidents lacked personal force to dominate the other branches of government, and yet another when Lincoln "seemed for a little while to become the whole government."

Woodrow Wilson—Constitutional Government pp 57, 58.

This same authority in discussing the authority of the President said,

"The makers of the Constitution seem to have thought of the President as what the sterner Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of the law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constjtutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it."

Ibid pp 59, 60.

While we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of Constitutional principle."

Ibid pp 59.

The fact that there is a danger, under practically any form of Constitutional government of a man of blood and iron or of great military genius overthrowing the authority of the legislature and taking over to himself most of the prerogatives of the government, is admitted by Bryce, the greatest English authority on the American Constitution, when he says that Julius Ceaser was more than a match for the Senate, Cromwell for the Long Parliament, Louis Napoleon for the French Assembly of 1851, and when the President happens to be a strong man, resolute, prudent and popular, he may well hope to prevail against a body which he may divide by a dexterous use of patronage or otherwise.

American Commonwealth pp 165.

During the short period of our National existence

there have been many intense struggles fought out upon the floor of Congress to maintain the integrity of our National Constitution. It has been assailed from many sources and for many purposes, but during this whole time it has never had a stauncher supporter or a more able exponent than Daniel Webster, who, although in the minority at times, consistently opposed what he considered unconstitutional usurpation of power by the President and equally unconstitutional acts of Congress in granting the President powers that appeared to be legislative. In discussing the Fortification Bill of 1835 which provided for the appropriation of $3,000,000 for military and naval services to be expended under the DIRECTION of the President he said,

> "The honorable member from Ohio, near me, has said, that if the enemy had been on our shores he would not have agreed to this vote, and I say, if the proposition were now before us, and the guns of the enemy were pointed against the walls of the Capitol, I would not agree to it. The people of this country have an interest, a property, an inheritance in this instrument, against the value of which forty capitols do not weigh the twentieth part of one poor scruple....For my part, I am content to show France that we are prepared to maintain our just rights against her by the exertion of our power when need be, according to the form of our own constitution; that, if we make war, we will make it constitutionally; and that we will trust all our interests, both in peace and war, to what the intelligence and the strength of the country may do for them, without breaking down or endangering the fabric of our free institutions."
>
> Works of Daniel Webster Volume IV, pp 226, 228.

While it is true that the courts have recognized

the right of Congress to authorize the working out of details by the Executive Department, it has only been where these details were considered to be administrative acts rather than legislative. However, in this Act of May 18, 1917, we find that its purpose is "to AUTHORIZE the President to increase temporarily the military establishment of the United States." No where in the Act is there any provision for raising a single additional unit or a member of any portion of the army. The preamble states "that in view of the existing emergency, which demands the raising of troops in addition to those now available," and then proceeds to fail to provide for the raising of a single additional man, unless the President so desires. By this act Congress declares that the situation is such that additional troops should be raised and then proceeds to authorize the President to say whether any troops shall be raised and, if so, whether they shall be raised by additions to the Regular Army, the calling out of the National Guard, the conscripting of men from the unorganized militia, or by voluntary enlistment. Such an act the plaintiff in error contends to be clearly the delegation of legislative powers to the President.

V.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of the fifth Amendment of the Constitution in that it subjects citizens of the United States to deprivations of life or liberty without due process of law, since it assumes to confer upon the President of the United States discretion-

ary and arbitrary powers in the selection of citizens into the draft army. This Court has repeatedly commented upon the acts of Congress which tend to take away the rights of the people under various gaises. This attitude was well stated by the court in the case of Boyd vs. U. S. when he said that

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed, a close and literal construction deprives them of half of their efficiency, and leads to gradual depreciation of the rights as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon."
>
> 116 U. S. 635.

These words of the learned judge have been quoted approvingly in several cases since that time.

In Re Debs 158 U. S. 594.

Gulf, Colorado & Santa Fe Ry. vs. Ellis 165 U. S. 154.

Fairbanks vs. U. S. 181 U. S. 301.

Brown vs. Walker 161 U. S. 617-635.

U. S. vs. Wong Kim Ark. 169 U. S. 654.

There can be but little dispute but that a person who becomes a member of the army loses his liberty or at least a large portion of it, but an army organized upon any other theory would have but a small degree of efficiency. This fact is well stated by Mr. Justice Brown in the case of U. S. vs. Clark when he says,

> "To insure efficiency, an army must be to a

certain extent, a despotism. Each officer, from the General to the Corporal, is invested with an arbitrary power over those beneath him and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence."

31 Fed. 710.

When a man enlists in the regular army or the National Guard, he agrees to accept this new status so that there is no infringement upon his liberty. Under the provisions of this Act of May 18, 1917 this plaintiff in error is to be taken and forced into the National Army on the decision of a person or persons appointed by the Governor of Minnesota and the Mayor of the City of St. Paul; forced to leave his business, to lose the right to support his family, lose his character as a citizen, his franchise, his civil right of a jury trial, the right to a trial in the civil courts, and his rights to the protection of the laws of the land. Can the deprivation of liberty mean more than this, and yet, under the National Constitution, the State or its officials have no right to raise an army.

It is evident from a careful reading of the Act approved May 18, 1917 that Congress recognized the fact that it was doubtful whether under ordinary circumstances and conditions of the nation it had the authority to pass such an act. This is shown by the preamble which gives the reason for the passage of the act in which it says "that in view of the exist-

ing emergency," and there is also a repeated reference to the 'existing emergency' throughout the various sections of the act. But the fact remains that an "existing emergency," either real or fancied, is no reason for the passage of a law which in itself is unconstitutional. This theory has been set aside for all time under the decision of this Court in the case of Ex Parte Milligan, a case growing out of the conditions of the time when this country was facing the most serious 'emergency' that has developed durin our history, and in that case this Court said.

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."
> 4 Wall 2, 142.

An "emergency" may be the basis and excuse for the passage of a law by Congress, but never the basis or reason for a decision or opinion of this court. Exercise of a power enjoyed by Congress is permitted as is of course, but 'emergency' as a reason for its constitutionality, is utterly unsound. Congress or the Executive through one cause or another may not be able or willing to find and use constitutional means to cope with a supposed existing emergency, but that does not signify it is not there, it only signifies they have been unable to find one, or are unwilling to use one that is known. The people are the ultimate authority is such a case, and if an emergency in fact exists, which cannot be reached under the Constitu-

tion, it can be met under the power of the Amendment as provided by Article 5 of the Amendments to the Constitution. In the past we have met great domestic crises and upheavals, and foreign dangers from which the people, through Congressional action, apparently for the time being, were unable to find immediate Constitutional means of relief; however, when the courts have refused to sanction the unconstitutional means proposed, Congress has been able to meet the situation, when necessary, with means that were Constitutional. For over one hundred years we have found the Constitution ample to meet every emergency and today the present emergency can be met without any encroachment upon either letter or spirit of that instrument—our fundamental law, but the Act approved May 18, 1917 violates both.

In conclusion this Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations prescribed thereunder are null and void in that Congress has no power under the National Constitution to raise an army by conscription. This fact is emphasized by the fact of the hostile attitude of the people of England and the American Colonies, during the 18th century, toward a standing army; and by the further fact of limiting the authority of Congress over the most important military force of that time—the militia.

This Act being an attempt by the federal government to raise an army by conscription, is in violation of both the letter and spirit of the Constitution, in that it is an attempt to force the members of the militia into the national army by means other than that prescribed by that instrument. The rights of the

members of the militia to be officered and trained by the States, as granted them by the Constitution, are denied and overridden by the provisions of this Act. Furthermore, since none of the conditions under which Congress can call forth of the militia exist, the militia, both organized and unorganized, could not be called forth either by Congress or the President, even though the act provided for the proper method of doing so.

However, if Congress had the authority to raise an army by conscription, this right was lost by the adoption of the XIII Amendment to the Constitution which prohibits involuntary servitude except as a punishment for crime.

If by any possible interpretation of the Constitution, Congress has authority to raise an army by conscription, it is clear that that authority can not be delegated to the President or any other administrative officer of the United States or of the States, yet the Act in question, makes no provision for raising an army, but authorizes the President, in his discretion, to provide for raising whatever forces he desires and in the manner in which he wishes. We urge that such a delegation of power comes within the inhibition of the Constitution.

Furthermore, by the provisions of this Act, various state officials are required to engage in the raising of an army under the direction of the President, and for failure or refusal to obey the dictates of the President are liable to arrest and imprisonment. This plaintiff in error is drafted by state officials into the national army while the Constitution prohibits the raising of such an army by the States. Also this

compulsion upon officials of the States destroys the sovereignty of the States in that sphere where they are supreme and breaks down the integrity of republican principles in their government.

By this Act this plaintiff in error is to be deprived of his liberty and possibly of his life without due process of law, and, upon the whim of a state official or an appointee of a state official, ordered into the conscript army, but without the rights reserved to him, as a member of the militia, under the Constitution and the laws of the land.

For these reasons Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations of the President prescribed thereunder be declared null and void.

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Attorneys for Plaintiff in Error.

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1917.

WALTER WANGERIN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
HONORABLE PAGE MORRIS,
Presiding Judge.

T. E. LATIMER,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error.

NO. 668

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1917

WALTER WANGERIN, Plaintiff in Error

VS.

UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.

HONORABLE PAGE MORRIS,
Presiding Judge

T. E. LATIMER,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error

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No. 863

IN THE SUPREME COURT OF THE UNITED STATES

WALTER WANGERIN, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error.

STATEMENT.

The Plaintiff in Error was tried and convicted at the June A. D., 1917, Term of the United States District Court for the District of Minnesota, Third Division, of violation of Section Five of the Act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

The Indictment contains one count charging the plaintiff in error did wrongfully and unlawfully, wilfully fail and refuse to register, and present himself for registration as required by said Act, Proclamation and Regulations.

A demurrer was filed to said indictment in which plaintiff in error demurred upon the following grounds, to-wit:—1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the Thirteenth Amendment of the Constitutionn of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section One of Article One, and Section Eight of Article One, of the Constitution of the United States of America, and therefore null and void.

This demurrer was overruled and the plaintiff in error duly excepted thereto, whereupon the case was set for trial July 2d, 1917, at which time he was tried, the jury returned a verdict of "guilty", and the plaintiff in error was sentenced by the Court to serve one year in the Minnesota State Reformatory.

SPECIFICATIONS OF ERROR.

The District Court of the United States for the District of Minnesota erred in overruling the demurrer of defendant.

BRIEF.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are

in conflict with the terms and provisions of Section 8, Article 1, of the Constitution of the United States.

Rhode Island vs. Massachusetts 12 Peters 657

Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

Martin vs. Hunter 1 Wheaton 304

3 Annals of 13th Congress 807

Kneedler vs. Lane 45 Pa. 238

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations perscribed thereunder is in conflict with the terms and provisions of the 13th amendment of the Constitution of the United States which prohibits involuntary servitude.

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 3

Plessy vs. Fergurson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 276

Clyatt vs. U. S. 197 U. S. 207

Hodges vs. U. S. 203 U. S. 1

Baily vs Alabama 219 U. S. 219

Butler vs. Perry 240 U. S. 328

U. S. vs. Sanges 48 Fed. 78

State vs. West 42 Minn. 47

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1, and Section 8, Article 1, of the Constitution of the United States in that congress attempts to delegate legislative power to the President of the

U. S. and other United States or state officials.

Stoutenburg vs. Hennick 129 U. S. 141

Field vs. Clark 143 U. S. 649, 692

U. S. vs. Blasingame 146 Fed. 654

U. S. vs. Keokuk etc. Bridge Co. 45 Fed. 178

Cooley, Constitutional Limitations Chap 5 P 137

Cooley, General Constitutional Principles of Law P 87

6 Opinions Atty. Gen. of U. S. 10

16 Opinions Atty. Gen. of U. S. 413

Bryce, American Commonwealth P 165

Wilson, Constitutional Government P 57, 58, 59

Webster's Works

The Federalist Chap. 69 P. 515

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4, Article 4, of the Constitution of the United States, and Article 10 of Amendments to the Constitution of the United States in that Congress attempts to require state officials to do that which is prohibited to the States themselves.

Collector vs. Day 1 Wallace 124, 126

McCulloch vs. Maryland 4 Wheaton 405

Dred Scott vs. Sanford 19 Howard 401

Worcester vs. Georgia 6 Peters 570

Kohl vs. U. S. 91 U. S. 372

U. S. vs. Reese 92 U. S. 214

U. S. vs. Harris 106 U. S. 629

Martin et al vs. the Lessee of Vaddell 16 Peters 410, 416

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Article V of Amendments to the Constitution of the United States providing that "nor shall any person be deprived of his life, liberty or property without due process of law."

In re Debs 158 U. S. 594
Boyd vs. U. S. 116 U. S. 635
Gulf Colo. & Santa Fe Ry. vs. Ellis 165 U. S. 154
Fairbanks vs. U. S. 181 U. S. 301

ARGUMENT.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of paragraphs 12 & 14 of Section 8, Article 1 of the Constitution of the United States in that Congress is attempting to raise an army by conscription.

In arriving at a proper interpretation of various sections of the Constitution this Court has had recourse in the past to an inquiry as to the state of things existing at the time of the adoption of the Constitution, and also a search of the contemporary history of that time.

Rhode Island vs. Massachusetts 12 Peters 657
Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

At the time our Federal Constitution was adopted here were two kinds of military service recognized

in the English speaking world—the militia and the **standing army.**

In the days of the Saxon Kings the militia in England was organized by counties for defence of the realm. This organization survived the Norman conquest in similar form and for similar purpose. Stubb's Select Charters P 153, 154. But Wm. the Conqueror brought with him to England an army composed of feudal and mercenary soldiers and thus planted on English soil a new military organization known as the standing army.

There was great hostility in England toward this army which resulted in many attempts to reduce its size and cripple its strength. It was entirely disbanded during the rule of Cromwell, but again revised and enlarged, and used by the later Stuarts as well as the Tudors as a means or oppression. One of the grievances set forth in the Petition of Rights in 1628 was the oppressive use of the standing army by the King. Appendix Stubb's Select Charters.

This was later expressed in the Bill of Rights offered in Parliament in 1689. One of the accusations against the King being that of "raising and keeping a standing army within his Kingdom in time of peace, without the consent of Parliament, and quartering soldiers contrary to Law. Statute of Realm pp. 142, 145.

Notwithstanding their hatred of the standing army and hostility to its command by the King the fear of invasion from the continent impressed upon them the need for such a military force. This situation was met by Parliament passing the Mutiny Act of 1689 and an act for the restriction of the grant of

revenues. Thus the discipline of the army and the grant of its supplies were made entirely dependent upon the will of Parliament. Since that time the Parliament has renewed this statute annually.—Macy —The English Constitution P 335.

Attempts were made by the Tudor Kings to raise an army by conscription and later a similar attempt by the Stuarts but without success, and until the Revolution of 1688 the British army was composed of mercenary and feudal soldiers. After the Revolution of 1688 several attempts were made in Parliament to provide for the raising of an army by conscription, but the only act applying to conscription that was passed by Parliament before the adoption of our Federal Constitution was passed in 1704, and provided among other things to

> "levy and raise all able bodied, idle and disorderly persons, who can not, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their support and maintenance, to serve his majesty as a soldier."—The Statute 4 Ann Chapter 10.

Later acts of Parliament contained similar provisions, but all attempts to extend conscription to other persons failed.

Statute 29 George II Chapter 4 (1755) 30 George II Chapter 8 (1757) 18 George III Chapter 53 (1778) 19 George III Chapter 10 (1779).

From these facts it may be seen that only paupers and vagabonds could be conscripted into the standing army in England; that no person who could vote for members of Parliament could be conscripted, and to all intents and purposes the membership of

the British army was based upon voluntary service. This fact was emphasized during our War of the Revolution when the Whigs were opposed to the war and the English King was compelled to hire Hessians and others from the continent to make up the English forces fighting against the colonies.

That this feeling against standing armies prevailed in America at the time of the Constitutional Convention of 1787 and especially among the delegates to that Convention is shown by the provision in Section 8, Article 1 of the Constitution of the United States which provides "but no appropriation of money to that use shall be for longer time than two years". The opposition to the raising and control of an army by the president is shown by the provisions of that section which gives to Congress power" to make rules for the government and regulation of the land and naval forces".

That Congress has recognized that it was the intention of the authors of the Federal Constitution to provide for the raising of the Regular Army by volunteer enlistment is shown by one hundred and twenty-seven years of national legislation. During all that time the subject of raising an army by conscription has been discussed in Congress only twice—once in 1814 when a bill providing for the raising of an army by conscription was introduced in Congress at the request of the Secretary of War but failed of being enacted into law. Daniel Webster perhaps the greatest expounder of the Constitution, opposed this measure upon the ground that it was in contravention of the terms and provisions of the Constitution of the United States.

In opposing this measure he said,

> "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, for the general purposes of the war, under the color of a military service...
>
> That measures of this nature should be debated at all, in the councils of a free government, is a cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form....
>
> The administration asserts the right to fill the ranks of the Regular Army by compulsion. It contends that it may now take one out of every twenty-five men, and any part or whole of the rest, whenever its occasions require. Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defense or for invasion, according to the will and pleasures of the government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.
>
> Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty?
>
> Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious

and mischievous government may require it?

In granting Congress the power to raise armies, the People have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the People themselves and they have granted no others. To talk about the unlimited power of the government over the means to execute its authority is to hold a language which is true only in regard to despotism. The tyranny of Arbitrary Government consists as much in its means as in its ends, and it would be a ridiculous and absurd constitution which should be less cautious to grant against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction, a free government without adequate provisions for personal security is an absurdity, a free government with an uncontrolled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered into the head of man."

Van Tyne, The Letters of Daniel Webster.

The question of raising an Army by conscription was again discussed by Congress in 1863 and a Conscription Act was passed by both Houses of Congress and signed by the President. 12 U. S. Statutes at Large 731.

The question of the constitutionality of this act was not determined by the Federal Courts. The only case before the courts in which the constitutionality of this act was considered and determined was in the State Court of Pennsylvania. In the case of Kneedler vs. Lane et al 45 Pa. St. 238 an injunction was sought against the officials entrusted with the duty of enrolling drafted men, to restrain them from

nrolling men in the drafted army on the ground hat the Act was null and void and in violation of he provisions of the Constitution of the United States. The Court granted a preliminary injunction y a vote of three to two holding the Act unconsti- utional. Later a new judge having been elected nd qualified, this position of the Court was reversed nd the Constitutionality of the Act upheld. Elabor- te opinions were rendered by individual judges and ome of the conclusions appear pertinent at the resent time. Chief Justice Lowrie urged that if 'ongress had the right to raise an Army by con- eription that this would subject all social, civil and ilitary organizations of the States to the Federal ower of raising armies and that nothing would be eft that had any constitutional right to stand before he will of the Federal Government. Kneedler vs. ane Supra pp. 246.

Another fact that was emphasized is that in all ases of forced contribution to the National Govern- ent allowed by the Constitution, such as duties, mposts, excises and direct taxes there was fixed he rule of uniformity, equality or proportion. That owhere in the Federal Constitution is there any eference to forced contribution to the Army or any ules for such contribution as is provided in all other uch cases. Kneedler vs. Lane Supra 242.

Judge Woodward calls attention to the fact that a areful study of the Constitution itself shows that here is no intention to authorize the raising of an Army by conscription and sets forth the 16th and 17th paragraphs of Section 8, Article 1 of the Federal Constitution in support of his contention. Kneedler

vs. Lane Supra pp. 256-257.

By the Act of Congress approved May 18, 1917, the first paragraph of Section 1, authorizes the President to raise and organize — — — such a number of increments of the regular army provided by the National Defense Act approved June 3, 1916, or such part thereof as he may deem necessary. This National Defense Act provides that

> "the army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now, or may hereafter be, authorized by the law."

Section 2 of said National Defense Act provides that the regular army shall consist of officers and enlisted men. Section 27 of such act provides that after November 1st, 1916 all enlistments in the regular army shall be for a term of seven years. Section 57 of said Act determines the composition of the Militia as follows:

> "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia."

Sections 69, 70 and 71 of said act provides for enlistment in the National Guard as follows:

> "Section 69—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three

years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Section 70:—Federal Enlistment Contract:—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligations the enlisted man shall not be recognized as a member of the National Guard until he shall have sgined an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this....day of..... 19...., as a soldier in the National Guard of the United States and of the State of..... for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of....., and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of....., and of the officers appointed over me according to law and the rules and articles of war."

"Section 71. Hereafter all men enlisting for service in the National Guard shall sign an en-

> listment contract and take and subscribe to the oath prescribed in the preceding section of this Act."

However, Section 2 of the Act of May 18, 1917 provides:

> That the enlisted men required to raise and maintain the organization of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and wherever the President decides that they can not effectually be so raised or maintained, then by selective draft."

Thus, for the first time in the history of this nation Congress attempts to provide for the raising of a regular army, an organization based upon voluntary enlistment, by conscription. These drafted men are to be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions of Section 8, Article 1, of the Constitution of the United States which specifically reserves to the States the authority of training the militia and the appointment of officers.

The third paragraph of Section 1 of the Act of Congress adopted May 18, 1917 authorizes the President

> "to raise by draft as herein provided, organize and equip an additional force of 500,000 enlisted men, or such part or parts thereof, as he may deem necessary."

Section 2 of said Act provides that

> "all other forces hereby authorized except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training

> cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act."

Section 5 of the same Act provides that

> "all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act. Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

By these provisions men between the ages of twenty-one and thirty, not otherwise exempted, among them the plaintiff in error, are to be taken from the group that Congress has designated as unorganized Militia and placed in the Regular Army, National Guard and Drafted Army at the will of the President in violation of the provisions of the Federal Constitution which refer to the militia as follows:—

> "Congress has power — — — to provide for the calling forth of the militia to execute the laws of the Union, to suppress insurrections and repel invasions; to provide for the organizing, arming and disciplining of the militia, and for the governing of such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

By the provisions of the Act of May 18, 1917, the appointment of officers and the authority of training the militia are placed in the hands of Federal Authorities, thus taking away the rights of these members of the unorganized militia which is specifically granted them by the Constitution.

Furthermore, these men who are members of the unorganized militia are not called forth to execute the laws of the Union. Congress, the President, the War Department nor any other authority contends that this army is being called forth for this purpose. The civil authorities are well able to execute the laws of the Union. There has been no need for any portion of the National Military Forces to be called forth to suppress insurrections, either now existing or likely to exist in the future, and the emergency set forth in said Act does not refer to insurrections. Also there is no foreign foe on our soil who is to be repelled nor is there any body of foreign troops quartered in the vicinity of our soil from whom an invasion is imminent. The existing emergency referred to in the Preamble of said law and in the several sections thereof is not due to the inability of this Government to "execute the laws of the Union".

ont the Militia to the three instances enumerated in

It may be pertinent to call attention to the fact that the "existing emergency" repeatedly referred to in the Act of May 18, 1917 grows out of a declaration of Congress that a state of war exists between this country and Germany and from said emergency there has developed no failure to execute laws, no insurrections and no invasions of our soil, but already a portion of the Regular Army of the United States is in France. Members of the National Guard are on the way to Eastern Ports of embarkation, cantonments have been built for the training and housing of the first draftetd army, and preparations are being made for the call of the second drafted army, as provided in paragraph 4, Section 1, of the act of May 18,1917. Instead of being called forth to repel invasion, our military forces including the National Guard and the unorganized Militia are being ordered across the Atlantic Ocean, there to engage in warfare three thousand miles from our soil, and Congress has authorized the President to authorize the Governor to authorize the Mayor to authorize the Local Exemption Board to call forth this plaintiff in error, a member of the unorganized militia to engage in this warfare.

During the whole history of the English speaking people, no such power has been exercised by the national, Legislature or Executive except as applied to paupers and vagabonds, and the attempted usurpation of said power was one of the contributing causes of the downfall of the Stuarts.

It may be well to examine the status of the Military system of England from which was developed the Militia of the Colonies, the early States, and later of

the United States. From the earliest time the militia has existed in England as a local force for defense. Stubbs Select Charters pp. 163 and 164. By statutes of Edward III, Chapter 2, and 4 Henry IV Chapter 13 the members of militia could not be compelled to go out of their Shires; by Statute 25 Edward III Chapter 8, and 26, George III Chapter 107 the members of the militia could not be ordered out of their own country unless in case of urgent necessity certified to by Parliament, and could not be sent out of the Kingdom under any circumstances whatever. The last statute above mentioned was passed in 1786, only one year prior to the meeting of the Constitutional Convention in Philadelphia.

Mr. Dicey in the Law of the Constitution pp. 287-288 states that

> "the Militia is a Constitutional Force existing under the law of the land for the defense of the country—embodiment indeed converts the militia for the time being into a regular army, although an army which can not be required to serve abroad."

The members of the Constitutional Convention clearly recognized the English theory of a militia as a force for internal defense and definitely limited the power of Congress and the President over this military force as is shown by the provision in Section 8 of Article 1 of the Constitution, where the right of appointment of officers and the authority of training the militia is specifically reserved to the States and Congress was limited very definitely as to the conditions under which it could call for the militia. Furthermore, in Section 2, Article 2, of the Constitu-

tion the control of the President over the militia as Commander in Chief was specifically limited to the time "when called into actual service of the United States". The attitude of the people of that time is shown by the fact that after all these safeguards were thrown about the Militia in the shape of limitations on Congress and the President it was considered necessary in order to protect the interests of the people to include in one of the first ten amendments to the Constitution, known as the Bill of Rights, Article 2 of the Amendments of the Constitution of the United States as follows:—"A well regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The intention of the authors of our Constitution and the attitude of the people at the time of its adoption is emphasized by an instance occuring at the Constitutional Convention. The Committee of Detail reported the clause authorizing Congress to provide for the calling forth of the militia and among other provisions included that of to "enforce treaties". Gouverneur Morris moved to alter this clause by striking out the words "enforce treaties" and this was adopted by a vote of the Delegates. Journal of Congress pp. 454-594.

If there could be any doubt in the minds of anyone regarding the intent of the members of the Constitutional Convention as to the power which the Constitution granted to Congress and the President over the militia, this act of striking out the provision giving the power to Congress to call forth the militia to enforce treaties placed the Convention clearly on

record as limiting the power of Congress in calling the Constitution, all of which are for service at home and within the boundaries of the Nation. In an early case Mr. Justice Story in discussing the rights of Congress over the militia stated:

> "It is almost too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in the clauses; and that in all other respects and for all other purposes, the militia is subject to the control of the government of the State authorities."—Houston vs. Moore 5 Wheaton 1, 51.

In 1912 during the administration of President Taft it appeared that an emergency might arise and a greatly increased number of troops might be needed and the question of calling forth the militia to be used in foreign warfare was seriously considered, and an opinion regarding the rights of Federal authorities to call forth the militia in such an emergency was taken up with the Attorney General of the United States and he was requested by the Secretary of War to give an opinion on the subject. In accordance with this request Attorney General Wickersham gave an elaborate opinion and among other things said:

> Sir: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:
>
> "Whether or not, under existing laws, the President has authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?"
>
> It is certain that it is only upon one or more

of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term "to repel invasion".

Then, too, "if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling invasion."

"What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsory executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

"So that when an armed force is used to compel the observance of treaty obligations or to punish or obtain compensation for their violation there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

"These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or its Territories. In the history of this

provision of the Constitution there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government was intended as a distinct limitation upon their employment.

"The militia of the States, restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties or to protect the rights of the government or its citizens in those cases in which protection must be sought beyond the territorial limits of the country."

"I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative."

This opinion was accepted by the President who was himself a jurist of ability and a careful student of the Constitution. This opinion of the Attorney General is binding upon the Executive Department of the Government and it has been recognized as correct by the present Executive administration. President Wilson in an address delivered in New York

City on January 27, 1916 said,

> "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our National defense should be built up and encouraged to the utmost; but you know, gentlemen, that under the Constitution of the United States the National Guard is under the direction of more than two score States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of actual invasion has the President of the United States the right to ask those men to leave their respective States."

He later made similar addresses at Cleveland, Ohio on January 29, 1916, at Milwaukee, Wisconsin on January 31, 1916 and at Topeka, Kansas on February 2, 1916.

New York Times Jan. 30th, 1916, Feb. 1st, 1916. Feb. 3rd, 1916.

The Act of May 18th is a violation of the 13th Amendment of our Constitution reading as follows:—

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The 13th amendment has been construed by this court in nine cases that are pertinent here as follows:—

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 417

Plessy vs. Ferguson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 275
Clyatt vs. U. S. 197 U. S. 207
Hodges vs. U. S. 203 U. S. 1
Bailey vs Alabama 219 U. S. 219
Butler vs. Perry 240 U. S. 328

The application of this Constitutional provision to the case at bar involves the construction of the entire amendment, possibly the definition of the word slavery, and an interpretation and construction of the phrase involuntary servitude. We take up the last of these first as being the more important.

The phrase involuntary servitude simply means a condition or status of compulsory service the clearest applicable term to the service provided for in the law.

Century Dictionary—Revised and enlarged Edition Volume 8, Page 5519.

Oxford New English Dictionary—Servitude Vol. 8, Page 522.

Funk & Wagnall's Standard Dictionary—Servitude Volume 8, Page 522.

Universal Dictionary of the English Language—Volume 4, Page 4213.

In the second and third of such authorities, Military and naval service are cited as examples of such service that existed in India and in England in the very early days.

Bouvier's Law Dictionary, Vol. 2, Servitude, 15th Edition.

Black's Law Dictionary, 2nd Ed. Page 656.

In State vs. West, 42 Minn. 47, Mr. Justice Mitchell says:

"There is nothing better settled than that en-

forced labor is involuntary servitude within the meaning of such constitutional provisions.

This court has defined it as a condition of compulsory service in the Clyatt case supra page 215 and the Bailey case supra page 243.

The Robertson case supra in effect admits that military and naval service are within the letter of the inhibition of the 13th amendment.

The amendment prescribes that the condition of compulsory service shall not EXIST in this land, and is clearly self-executing, and by the use of the word EXIST it places its inhibition on every individual, and on the National Government as well as the states.

As an inhibition on the national government Robertson vs. Baldwin supra in a case involving the constitutionality of a natonal law condemned for permitting involuntary servitude classes the amendment with the Bill of rights as a limitation on the power of the Federal Government. Harlan, Judge in the dissenting opinion thereto pages 292-3 so classes it, citing the opinion of Mr. Justice Miller in the Civil Rights cases supra at page 20, paragraphs two and three. See also dissenting opinion to that case at page 35, paragraph 2. To the same effect see numerous and clear expressions of the court in the Plessy, Clyatt and Bailey cases supra.

Also U. S. vs. Sanges 48 Fed. 78

Black on Constitutional Law, 2nd Ed. Page 461

McClain on Constitutional Law says.

"Amendment XIII prohibiting slavery or involuntary servitude is applicable not only to the Federal Government, but also to state governments and to individuals as well."

We gather from the foregoing and urge here that thereby the inhibition condemns the practice of slavery, and involuntary servitude, whether the dominant one be either an individual, or the state or National governments, and as well condemns laws by such sovereignties permitting it or compelling it.

In support of this theory we wish to quote the late Justice Moody who as Attorney General ruled, Opinions A. G. Volume 25, Page 474, that the ordinance of the Panama Canal Commission amounting to an executive act of that department compelling laborers contracting with the commission for a term of service to complete their term would be involuntary servitude within the amendment. In short the executive department of the government cannot hold a person in at least that capacity in a condition of involuntary servitude.

Mr. Justice Moody says to the Secretary of War:

> "I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you inform me that the executive committee of the Panama Commission desires me to formulate a series of rules and regulations the observance of which would enable that committee, in making contracts for the furnishing of labor, to avoid a condition of peonage under the authority of the United States. The word slavery as used in it is descriptive of the chattel slavery which once existed in this country. That any such condition would be established by any officer of the United States is so inconceivable that it need receive no attention. But the words involuntary servitude are much broader than slavery, and include within their meaning many forms of service which cannot properly be described as slavery."

On page 477 he says,

> "I have no hesitation in saying that any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude within the meaning of the Constitution."

On Page 481 he says,

> "I entertain no doubt that the condition described in this ordinance is that of involuntary servitude and not the less involuntary servitude because the contract of service in which the laborer submits to the conditions prescribed by the ordinance was entered into freely and voluntarily and under careful public supervision."

Further on page 482 he says,

> "In the employment of labor on the canal the utmost care should be taken to exclude the conditions which have been indicated as those of involuntary servitude or any other conditions of like effect and tendency. This care should be exercised not only in making the contracts to which the UNITED STATES IS A PARTY, but in scrutinizing the contracts, usages and practices between those who agree to furnish contract labor to the United States and the laborers themselves."

Thus we see that there is substantial authority to the effect that forms of slavery and involuntary servitude practiced by the National Government as a master and laws by it permitting or compelling the condition are unconstitutional. We think too, that the national feeling which forced the 13th amendment clearly shows this through the passage and repeal of various laws such as the various compulsory road laws, and the repeal of the seaman law in controversy in the Robertson case and others to like effect. In practically the only case going into the subject of the compulsory road laws cited in the Butler case supra,

and upon which is based that of Dasler vs. Kansas, the law was vehemently attacked as a minor, subtle entering wedge for the return of forms of slavery to the state, and the court said in passing on it, that we could deal with the more flagrant forms when we came to them. The road laws were accepted as means of organization only, because the service would have been cheerfully rendered without it, as it is in all states of the Union today.

A return to compulsory military service would be a distinct return to the principles of feudalism, and particularly and clearly to that form known as vassalage, denounced by Mr. Justice Field in his dissenting opinion in the Slaughter-House cases supra at Page 69, as within the amendment and in the same class with peonage, serfage, villeinage and etc. Vassalage is herein otherwise treated, but we think we ought to recall the court's attention here to the fact that the essence of it was compulsory military service to the King or Lord, in return for protection and tenure of land.

We find in Henry Wilson's Rise and Fall of the Slave Power in America, Volume 2, Page 60, that the southern states themselves sold slaves on the block at auction. And under such circumstances we have no doubt that the states themselves, through escheat or otherwise, held slaves as did the governments of ancient Greece and Rome. Does anybody doubt that the 13th Amendment inhibited such practices, and such practice by the National Government, as Justice Moody says.

The government may regulate the right to quit to such limited extent as does not en-

croach on the spirit of the prohibition protecting the laborer and soldier's liberty which will under ordinary conditions prevent a disorganization of the system. If the state could compel its citizens to labor on the canal, it could compel them to build another Appian way, and the Pyramids. It is true that under most any situation, such action by a government elected by the people is unthinkable, but no one can gainsay the fact that peculiar unsettled conditions among the electorate may produce a despotic government, in which case for at least two years, the Constitution is our only protection.

In Missouri the courts decided in In Re Thompson 117 Mo. 83 that a law authorizing Justice of the Peace to empower the sheriff to hire out vagrants for a period of six months for cash was held involuntary servitude within the 13th amendment. This well illustrates how our country's Constitution has developed and improved on the English Constitution as it was when ours was adopted as to involuntary public service, when compared to the compulsory service of vagrants only in the English army and navy of that time, herein otherwise noted. As otherwise shown compulsory military service generally, was unconstitutional in England at that time and for many years prior thereto.

Every evidence from the language of the amendment itself, and from a history of the character of the times, leads to the conclusion that it is to be contsrued in its broadest sense.

Mr. Justice Field in Slaughter-House cases supra page 90, says:

"Still it is evident that the language of the

> amendment is not used in any restrictive sense. It is universal in its application."

The use of the disjunctives "neither" and "nor" disassociate "slavery" and "involuntary servitude" and render them independent of each other.

The amendment in itself, says Mr. Justice Brown in Robertson vs. Baldwin supra, makes no distinction between public and private service. Would it not follow ordinarily that there was none intended?

The amendment itself makes one exception, that of compulsory service for crime. The inference is to be drawn that there were no others, and that if any were intended they would have been stated. Clearly above any others, no public servitude was intended to be excepted, as service for crime being a public servitude, in which the state is the dominant and the criminal the servient factor, is expressly excepted from its operation, leaving the inference that no others of that class were intended to be excepted. In plain words the only act of sovereignty in which compulsory service is permitted is service for crime.

2 Story on Constitutional Law, Section 1924 says:

> "The 13th amendment forbids not merely the slavery known to our laws, but all kinds of involuntary servitude not imposed in punishment of a public offense.

If the government's theory and contention is correct that all public service, or any compulsory service that the public wishes to impose, or has in the past imposed, is a general exception to the language of the amendment, then the only expressed exception is of no value whatever, and is to be treated as surplusage, and might as well have been eradicated

therefrom by the framers. This court in the past has not been given to such a construction. Under the exception in the language, the state may hold a man to compulsory service for crime.

The amendment in lieu of many other possible words and phrases to express a prohibition uses the drastic phrase and word "shall not exist", clearly making the provision self-executing, denouncing a condition or status, by whomsoever created or maintained, be it individual, corporation, state or Nation.

This court as jealously guards the many and inalienable rights of the people, as it has recently jealously upheld the plenary powers of the government.

The high pitch of the public nerves at the time the amendment was adopted, by reason of the war, the draft act and the riots incident thereto, and many like and subsidary incidents, attest the mood of the public, and its desire and intent for sweeping changes in policy. The fact that the draft act directly preceded the 13th amendment, that it was clearly in the minds of the public, that it engendered terrific opposition, that such an act had theretofore been considered unconstitutional, and the fact that a constitutional amendment prohibiting involuntary servitude, would cover every form of compulsory service, including service to the public, and the legislature in voting on such an amendment would so construe it and believe they were covering this class of service as well as any other, is added reason to give effect to their votes. Today if we were to prohibit by another amendment just such service, we could use no better language considering the broad general language in such instruments than

to repeat the language of the 13th amendment as it now is.

It seems to us that conscription was so clearly in the mind of the public and all bodies proposing or voting on the instrument, that had they intended to make an exception of compulsory military service, they would have done so in the amendment. Instead they make but one exception, involuntary servitude being permitted to the government in cases of conviction for crime. If the English language has even an approximately definite meaning we must say that the framers of the 13th amendment by making one definite exception meant to exclude all other forms of slavery or involuntary servitude.

A number of forms of service which are apparently comparable to military service and are public services or otherwise sanctioned by usage, and have survived for such reasons, has been called to our attention by the cases, and we herewith list them in somewhat the order of their strength with military service, for the purpose of commenting on same. Military service—service on roads—jury service—service as a witness—service in posse of sheriff—service of sailor—service of apprentice to master—service of child and ward to parent and guardian—power of legislature to punish abandonment of labor in extreme cases—compulsory education—service in the pest-house. The involuntary servitude of a sailor that was held constitutional in the Robertson case, has been abolished by Sections 8304-13 U. S. Compiled Statutes. Neither is compulsory service of an apprentice to a master tolerated here now. Both of these however were non-public ser-

vices but they show how the so-called exceptional cases are going. The Compulsory Road Laws as Justice McReynolds in the Butler case says were at one time in effect in thirty-eight states of the Union but are now in effect in seven states, possibly only five and these all southern states that have not progressed as fast as the balance of the states. Official Good Roads Book United States—Published by American Highway Association at Page 67—Local Revenues and Labor Taxes and the statutes of the states herein cited. One thing is true of this service, as that of Jury, witness and posse service, that the service generally would have been cheerfully rendered without the law. The compulsory feature was simply a more efficient means of perfecting an organization to which few objected later. Jury service and compulsory process for witnesses however, are by express provision provided for in the Constitution. Service of child and ward to parent and guardian, compulsory education and service in the pest-house are not compulsary service in any sense but a mere regulation of liberty not amounting to a deprivation and on the same plane as the well-known limitations on the right of free speech and carrying weapons that do not amount to deprivations of the rights.

There is some dicta in the Robertson and Butler cases supra to the effect that the doctrine that compulsory military service was unconstitutional and incompatible with a free government was a novel doctrine at the time the 13th amendment was adopted, and that it was an exceptional service sanctioned by immemorial usage and needed no expressed exception in the amendment to be excepted from its operation

We need but to refer here to the history of military service as it relates to our laws and institutions and those upon which they are based and herein otherwise set forth and fully discussed to establish the fact that voluntary service was the only one tolerated, and that conscription or compulsory service was the novelty and unconstitutional. It was opposed and every possible guard placed against it at all times.

Under our articles of Confederation Congress had no power to raises armies but had to ask the states for quotas. Our Constitution itself was drawn and intended to perpetuate here all the liberties held by the citizens of England, and to perpetuate and establish more and greater liberties than existed in the mother country and prevent tyranny by the state.

Then followed the 13th amendment, which was in the words of this Court, a charter of universal freedom. Can it possibly be said that the unconstitutionality of Compulsory Military Service is a novel doctrine and that this sweeping provision establishing a principle rather than inhibiting particular cases does not cover it.

One ground for Judge Brown's decision in the Robertson case has been directly overruled by this court in Bailey vs. Alabama supra—That is that a service voluntary at the start by contract is in law voluntary during the period of the contract notwithstanding it is in fact involuntary at any time during the period.

The other ground for the decision, the one in point here, was very much mutilated by the dissenting opinion of Justice Harlan. His opinion was quoted approvingly by District Judge McPherson in Union Pacific Railway vs. Ruef 120 Federal 102-111.

Judge Brown did not have an exceptional public service to deal with, as did Judge McReynolds, it was simply an exceptional private service.. The seaman's law in question has been long abolished by congress in strict conformity to what we think was the spirit coming from the 13th amendment and the times of its adoption, and we are sure the dangers that Judge Brown feared from such a rule as set out in his opinion have undoubtedly not been realized. Judge Harlan says in that opinion that public service is in no legal sense involuntary servitude. But that cannot lie considering the broad definition of the term laid down in the Clyatt and Bailey cases.

Judge Brown also classes the 13th amendment with the Bill of Rights and cites what he calls exceptions: A careful perusal thereof seems to us will show that such exception so-called would be mere regulations not amounting in any sense to a deprivation of the right.

In five cases cited in State vs. Wheeler, the 13th amendment was not raised and the same was true of Sawyer vs. Alton. That in Dennis vs. Simon the amendment was raised but not discussed, and the Canadian case could have no bearing anyway under our Constitution. Only Dassler vs. Kansas supports it, and the law and a decision on it were bitterly attacked as an entering wedge in a case of apparently no moment to be used as a basis for a decision in a case of tremendous moment which would amount to slavery to the state.

But in all of the above mentioned cases, which are apparently comparable to compulsory military service there is one elemental difference between them

and compulsory service. The servitor loses none of his rights as a citizen of the state wherein he resides or of the United States. He still has the right of suffrage, the right to be represented by an attorney, the protection of the civil laws, and in cases of transgression, the right to be tried by a jury under the provisions of the civil laws and to receive such punishment as provided by the civil laws. Furthermore the terms of service is temporary and definitely fixed by the laws and customs permitting the same.

In the case of military service, the servitor becomes a mere tool in the hands of his superiors. Except, where given that right by statue, which has been done in a very few states, he has lost the right of suffrage, he has lost the protection of the civil laws. He is bound by autocratic rules and regulations promulgated by the President, Congress, the War Department, and a host of immediate superiors and which are enforced according to the whim of the commanding officer. When he transgresses he is tried by court martial. He can have no attorney to present his facts and defend him, no jury to pass upon the evidence, and the kind and amount of punishment lies in the justice and mercy of his military judges. The Constitutional guarantee of the right of suffrage and the right of jury trial, the protection and duties of the civil laws afford him no relief. His paramount duty is to obey, blindly and implicitly the military commands and regulations, his only privileges are those granted by the superior military authorities and his only protection is the justice and mercy of his military judges.

True his term of service is at present fixed by sta-

tute, but with compulsory military service enforced, and the right of suffrage limited to a majority of those directly or indirectly benefited by compulsory military service and a great standing army, what guarantee is there that the term of such service will not be extended indefinitely or made a life service? What guarantee is there that we will not build up in this country a military caste and a military system that would make the German system appear an inefficient weakling?

Voluntary military service is based on a contract; but some of the cases seem to indicate that after the contract has been consummated it becomes more than a contract, that it becomes a status which binds the servitor in the service until the contract expires or is terminated by the consent of the parties.

Even if this be true we must admit that the status is based and must be based on a contract voluntarily entered into by the parties. If a status, involving the liberty, the very life and limb of the servitor can be created by law based on compulsion and force, then the whole structure work of republicanism crashes to the ground, and the liberties of the individual, hewn by centuries from the bodies of countless martyrs become a mirage. Conscription presupposes no voluntary contract of service, therefore no status has and can be created, the services rendered become an involuntary servitude such as is forbidden by the 13th Amendment. The English speaking people have always feared and abhored compulsory military service as a careful reading of their statutes, parliamentary debates and legal discussions will show. The draft act of the 60's was never passed upon by the

federal courts. Although passed in the midst of a great civil war, the conscript army so raised to be used in quelling an insurrection that meant the destruction of the very nation itself, the Act provoked riots and opposition from one end of the country to the other, altho the act was not rigidly enforced and permitted the drafted man to hire a substitute for a reasonable amount. The people still smarted from the sting of its lash, still bitterly resented a curtailment of their liberties and then their representatives, acting upon public demand, passed and made a part of the great national constitution the famous 13th Amendment, and in that Amendment its framers, with the Draft Act and its riots and opposition still fresh in their minds, pronounced, NEITHER slavery NOR involuntary servitude, except as a punishment for crime.... shall exist. Knowing the military history of their country and their mother country, knowing that a vast number of the population considered the draft Act unconstitutional, they used a few brief nouns having a definite meaning, the conjunctives 'neither, nor' and the transitive verb 'shall', and in that single terse command "neither slavery nor involuntary servitude.... shall exist," they inserted the one single exception, "except as a punishment for crime whereof the party shall have been duly convicted."

III

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4 of the Constitution of the United States and Article 10 of the

Amendments to the Constitution of the United States, in that Congress attempts to require the State officials to do that which is prohibited to the States themselves. Chief Justice Marshall in an early case has well stated the relation existing between the State and Federal Governments and in discussing this subject he said,

> "The powers exclusively given the Federal Government are limitations upon the State authorities but, with the exception of these limitations, the States are supreme and their sovereignty can be no more invaded by the action of the State Government than the action of the State Government can arrest or obstruct the course of National Power."
>
> Worcester vs. Georgia 6 Peters 570

The right of the Federal Government to interfere with the sovereignty of the State was raised in the case of Collector vs. Day. Congress having passed an Act providing for the raising of revenue by an income tax, one of the United States Collectors collected from Judge Day, a State Official, a tax on his salary which was paid under protest and an action brought to recover it. Mr. Justice Nelson in commenting on the Act said

> "The Federal Government and the States, although both existing within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limit of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States" and therefore it was held that the Federal Government could not tax the income of the State Officials since it would interfere with the

efficiency of the State Government. 11 Wallace 113, 124.

The Dual form of government existing in this country and the supremacy of each government within its own sphere, precluding the right of interference on the part of the other government within that sphere, has become well settled after a thorough discussion of this relationship in our courts by some of our greatest jurists.

United States against Railroad Company, 17 Wallace 322, 332.

McCulloch vs. Maryland 4 Wheaton 316—405.

Dred Scott vs. Sanford 19 Howard 401.

Kohl vs. United States 91 United States 367—372.

The courts have recognized that when the States had established their independence of Great Britain the powers which had existed in the King and Parliament were taken over by the people of the States and that later certain grants of this power was given to the Federal Government; but only to the extent of these grants are the States and the people limited in their powers. In the case of Martin et al vs. The Lessee of Vaddell the court said,

> "When the Revolution took place the people of each State became themselves sovereign." "When the people of New Jersey took possession of the reins of the government and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or Parliament, became immediately rightfully vested in the State."

16 Peters 410, 416.

The fact that one government is supreme in a given field does not permit it to use that as an excuse to

so exercise its powers as to interfere with the workings of the other as a separate government. In fact as far as the Federal Government is concerned the Constitution of the United States has made it a duty of Congress to guarantee to every State of the Union a republican form of government and this injunction of the Constitution applies to the acts of the Federal Government as well as to those of any foreign country.

In Martin vs. Hunter's Lessee the court said,

> "I am firmly pursuaded that the American people can no longer enjoy the blessings of a free government whenever the States Sovereignty shall be prostrated at the feet of the Federal Government."

1 Wheaton 363.

In the case of Texas vs. White the court again emphasized this proposition and said,

> "Not only therefore, can there be no laws of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

In the light of these decisions and the provisions of the Act of May 18.1917 above quoted, it is difficult to realize that Congress would attempt to place on the Statute Books of this nation a law containing the provisions set forth in Section 6 of said Act which reads as follows:

> "All the officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or ap-

> pointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct.....Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty:..... shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by courtmartial and suffer such punishment as a court-martial may direct."

In accordance with the provisions of said Act of May 18,1917, the President prescribed certain registration regulations, and Section 5 of said regulations after quoting in full Section 6 of said Act reads as follows:

> "It will be found by an examination of these regulations which contain the President's directions to officers of the Nation, State, counties, and municipalities, and to other persons designated to perform duties in connection with the registration, that the President has directed specific duties to be performed by certain of such officers and that he has authorized the Governors of States and officers of counties and municipalities to employ certain persons as agencies in the execution of this act. Since the act prescribes the penalty of imprisonment (with no alternative of fine) for the failure or neglect of such officers and agencies to perform duties so prescribed by the President, every person charged with duties should carefully study the instructions in general, and in particular so much thereof as pertains to his own peculiar duties."

These regulations prescribe that the Governor of the State shall appoint the Registration Board in all Counties or similar divisions outside of cities of 30,000 population or over, that he shall notify such Boards of the date for Registration and of all their duties and direct the Sheriff in said Counties to appoint Registrars in each voting precinct. (Section 19.)

He shall direct the Mayor or similar official to appoint the Board of Registration in the case of cities of 30,000 or over. He shall see that all such appointments have been made. He shall notify the Wardens of Penitentiaries and other penal institutions that they shall register their inmates. (Section 20.)

He shall see that the proper Registration Booths are provided throughout the State. (Section 21.)

He shall distribute forms for registration to the penal institutions and to the Sheriffs and Mayors within the State where there is a deficiency in the supply of forms. (Section 23.)

He is required to speed up the work of registration. (Section 24.)

On the sixth day after the President's Proclamation he is required to report to the Provost Marshal General regarding the condition of the supply of forms and as to whether the organization is in readiness in his State. (Section 25.)

He is to receive the summaries of the county and city returns on the day after registration and shall consolidate these returns and telegraph the same to the Provost Marshal General. (Section 26.)

He shall later receive a complete summarization of the registration in the various counties and cities of the State and consolidate these and forward them to

the office of the Provost Marshal General without delay. He shall also secure a list o who have rendered uncompensated service solidate these showing the names and addr forward them to the office of the Provost General without delay. (Section 28.)

The duty of the Mayor or similar officer of 30,000 or over as set forth by the Re Regulations are as follows: He shall appoi istration Board for approximately each 30,(lation. He shall collect, receive and forward of the Registration cards and reports from and shall conduct all the correspondence for t of Registration in his city with the office o jutant General. (Section 10.)

He shall instruct the officers within such provide for Registration Booths and see booths are provided. (Section 21.)

He is to receive the forms for registrati the number sent him, notify the Governor th received the same and the condition of rea his city. (Section 23.)

On the sixth day after the President's tion he will report to the Governor by tele cerning the state of supply of forms and the ment of Registrars. (Section 25.)

On the day after Registration he shall te summary of the city returns to the Governo tion 26.)

He shall prepare a complete summarizati Registration in his city and report the sa Governor by mail and shall furnish the Gove a list of persons who have rendered uncon

service. (Section 28.)

He must furnish Registration Cards to the City Clerk and receive the Registration Cards from the sick and those temporarily absent and turn them over to the proper Registrars. (Section 35.)

The duties imposed upon Sheriffs of the various counties of each State by the Registration Regulations are similar to those imposed upon the Mayor.

Prosecuting Attorneys and City Attorneys are required to act as the legal advisors of the Registration Boards and Registrars and aid and advise in all matters touching Registration. (Section 15.)

City and County Clerks are required to furnish cards to the sick and non-resident persons, to certify to said cards and must familiarize themselves with the duties of the Registrars and instructions in order to answer all questions. (Section 32.)

After setting forth the above required duties on the part of the State, County and City Officials the Registration Regulations in Section 29 declares that:

> The foregoing are only the immediate duties of the governors and mayors of cities of 30,000 population or over in connection with the registration. For the further purposes of supervising the draft, the office and duties of the State organization are of ever-increasing importance, and it is the intention to decentralize the execution of the law and place its execution in each State in the hands of the governor and others named to perform certain duties.

Thus instead of Congress raising an army in accordance with the provisions of the National Constitution it has passed an act which requires the States through their Officials to raise armies under the supervision of the President and the War Department.

By the Constitution and laws of the various States, Governors, Sheriffs, Mayors, County and City Clerks and other County and State Officials are elected and have certain duties to perform. By this act of Congress and the regulations prescribed thereunder these State, County, and City Officials are required to take up the new duties imposed upon them by the Federal Government and if any one of them fail or refuse to perform these duties, he is liable to arrest by the United States Marshal to be tried in the Federal Courts and upon conviction to be sentenced to serve not more than one year. Their State duties are to give way to the orders of the National Executive and in all of these acts they are doing that which is forbidden to the State of which they are an official, to wit:—the raising of an Army.

In Collector vs. Day, supra, the Supreme Court of the United States held that the Federal Government could not tax the salaries of the State or County officials as that would interfere with the rights of the State to maintain its sovereignty. How much less may the State maintain its sovereignty if its officials are required to give of their time and services in carrying out the mandates of the Federal Government and upon their failure to do so shall be taken from their offices and incarcerated.

If any power outside of the State Government or its citizens can control the acts of the State officials, whether that power be a foreign prince or potentate, a United States Congress or President, then that State loses its republican form of government. If a State government is to continue its existence within the Nation, its officials must be free to exercise their

duties as laid down by the State Constitution and the laws enacted thereunder, unless in violation of the National Constitution, without interference from other sources claiming the power to control and dominate them as State Officials.

IV.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1 and Section 8, Article 1, of the Constitution of the United States in that Congress attempts to delegate legislative power to the President of the United States and other United States and State Officials, to raise an Army.

Section 1, Article 1 of the Constitution of the United States provides,

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8, Article 1 provides,

> "The Congress is to have the power: ..... to raise and support armies; .....to make rules for the government and regulation of the land and naval forces."

Section 2, Article II provides,

> "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."

The authority of the President over the army was discussed by some of the authors of the Federal Constitution after the Constitutional Convention adjourned, in one of a series of papers published to influence the States to adopt the Constitution, which

papers were later published in a volume known as "The Federalist." This particular paper was prepared by Alexander Hamilton and in it he compared the authority of the President over the Army and Militia with that of the King of England and the Governor of New York. Among other things he said,

> "The most material points of difference are these: First, the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain, and the Governor of New York have at all times the entire command of all the militia within their respective jurisdictions: Second. The President is to be Commander-in-chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British King extends to the declaring of war, and the raising and regulating of fleets and armies."—The Federalist, Chapter LXIX pp 343.

Another eminent authority on the Constitution of the United States has said that

> "a settled maxim in Constitutional law is that the power conferred upon the Legislature to make the laws can not be delegated by that department to any other body or authority."—Cooley General Principles of Constitutional Law, pp87.

In the case of Field vs. Clark 143 U. S. 649,692 the court stated,

> "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government organized by the Constitution."

In applying these principles the Federal Courts have held that Congress cannot authorize the Secretary of the Interior to make provisions or protection against destruction by fire and depredation upon the public forest reservations and provide for the punishment for violation of said law or regulations of the Secretary.

U. S. vs. Blasingame 116 Fed. 654.

Also that Congress cannot delegate to the Secretary of War the power to determine whether a bridge lawfully constructed is an obstruction and must be removed.

U. S. vs. Keokuk etc. Bridge Company 45 Fed. 178.

The authority of the President over the army and navy has been made a subject of ruling by the Attorney General of the United States from time to time and in those opinions the fact has been emphasized that the President has no Legislative powers except as he may veto legislation. Further that the Constitution has carefully distinguished the two powers of the executive, or administrative, and the legislative, one from the other and has held various regulations made by the President to be void under the Constitution.

6 Opinions Attorney General 10 (1853)
10 Opinions Attorney General 413 (1862)

In all civilized countries of the world there has been an age-long struggle between the Executive and the Legislature for supremacy. For centuries the history of the English people has been simply a story of the struggle between the King and Parliament for domination of the English Government, with the

authority of Parliament gradually gaining ascendency. This is simply one of the reflexes of the struggle of the people against Absolutism and each victory gained for Parliament has been one more step in the progress towards Democracy. This feeling against immense power being placed in the hands of the Executive was reflected in our National Constitution, which provides for a President with limited powers and having the same amount of authority continuing so long as that instrument remains unchanged.

There are, however, many in this country who look upon the relative powers of the various departments of government as something to be determined by the amount of influence a given department may exert over the others rather than by the Constitution, and especially is this true of the Executive. One authority states that "the presidency has been one thing at one time, another at another, varying with the man who occupied the office." "The office was one thing from 1789 to 1825 when English precedents and traditions were strongest, and another thing during Jackson's time when he worked his own will with or without sanction of law and still another thing from 1836 to 1861 when the Presidents lacked personal force to dominate the other branches of government, and yet another when Lincoln "seemed for a little while to become the whole government."

Woodrow Wilson—Constitutional Government pp 57, 58.

This same authority in discussing the authority of the President said,

"The makers of the Constitution seem to have thought of the President as what the sterner Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of the law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it."

Ibid pp 59, 60.

While we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of Constitutional principle."

Ibid pp 59.

The fact that there is a danger, under practically any form of Constitutional government of a man of blood and iron or of great military genius overthrowing the authority of the legislature and taking over to himself most of the prerogatives of the government, is admitted by Bryce, the greatest English authority on the American Constitution, when he says that Julius Ceaser was more than a match for the Senate, Cromwell for the Long Parliament, Louis Napoleon for the French Assembly of 1851, and when the President happens to be a strong man, resolute, prudent and popular, he may well hope to prevail against a body which he may divide by a dexterous use of patronage or otherwise.

American Commonwealth pp 165.

During the short period of our National existence

there have been many intense struggles fought out upon the floor of Congress to maintain the integrity of our National Constitution. It has been assailed from many sources and for many purposes, but during this whole time it has never had a staunchcr supporter or a more able exponent than Daniel Webster, who, although in the minority at times, consistently opposed what he considered unconstitutional usurpation of power by the President and equally unconstitutional acts of Congress in granting the President powers that appeared to be legislative. In discussing the Fortification Bill of 1835 which provided for the appropriation of $3,000,000 for military and naval services to be expended under the DIRECTION of the President he said,

> "The honorable member from Ohio, near me, has said, that if the enemy had been on our shores he would not have agreed to this vote, and I say, if the proposition were now before us, and the guns of the enemy were pointed against the walls of the Capitol, I would not agree to it. The people of this country have an interest, a property, an inheritance in this instrument, against the value of which forty capitols do not weigh the twentieth part of one poor scruple....For my part, I am content to show France that we are prepared to maintain our just rights against her by the exertion of our power when need be, according to the form of our own constitution; that, if we make war, we will make it constitutionally; and that we will trust all our interests, both in peace and war, to what the intelligence and the strength of the country may do for them, without breaking down or endangering the fabric of our free institutions."
>
> Works of Daniel Webster Volume IV, pp 226, 228.

While it is true that the courts have recognized

the right of Congress to authorize the working out of details by the Executive Department, it has only been where these details were considered to be administrative acts rather than legislative. However, in this Act of May 18, 1917, we find that its purpose is "to AUTHORIZE the President to increase temporarily the military establishment of the United States." No where in the Act is there any provision for raising a single additional unit or a member of any portion of the army. The preamble states "that in view of the existing emergency, which demands the raising of troops in addition to those now available," and then proceeds to fail to provide for the raising of a single additional man, unless the President so desires. By this act Congress declares that the situation is such that additional troops should be raised and then proceeds to authorize the President to say whether any troops shall be raised and, if so, whether they shall be raised by additions to the Regular Army, the calling out of the National Guard, the conscripting of men from the unorganized militia, or by voluntary enlistment. Such an act the plaintiff in error contends to be clearly the delegation of legislative powers to the President.

V.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of the fifth Amendment of the Constitution in that it subjects citizens of the United States to deprivations of life or liberty without due process of law, since it assumes to confer upon the President of the United States discretion-

ary and arbitrary powers in the selection of citizens into the draft army. This Court has repeatedly commented upon the acts of Congress which tend to take away the rights of the people under various guises. This attitude was well stated by the court in the case of Boyd vs. U. S. when he said that

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed, a close and literal construction deprives them of half of their efficiency, and leads to gradual depreciation of the rights as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon."
>
> 116 U. S. 635.

These words of the learned judge have been quoted approvingly in several cases since that time.

In Re Debs 158 U. S. 594.

Gulf, Colorado & Santa Fe Ry. vs. Ellis 165 U. S. 154.

Fairbanks vs. U. S. 181 U. S. 301.

Brown vs. Walker 161 U. S. 617-635.

U. S. vs. Wong Kim Ark. 169 U. S. 654.

There can be but little dispute but that a person who becomes a member of the army loses his liberty or at least a large portion of it, but an army organized upon any other theory would have but a small degree of efficiency. This fact is well stated by Mr. Justice Brown in the case of U. S. vs. Clark when he says,

"To insure efficiency, an army must be to a

> certain extent, a despotism. Each officer, from the General to the Corporal, is invested with an arbitrary power over those beneath him and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence."
>
> 31 Fed. 710.

When a man enlists in the regular army or the National Guard, he agrees to accept this new status so that there is no infringement upon his liberty. Under the provisions of this Act of May 18, 1917 this plaintiff in error is to be taken and forced into the National Army on the decision of a person or persons appointed by the Governor of Minnesota and the Mayor of the City of St. Paul; forced to leave his business, to lose the right to support his family, lose his character as a citizen, his franchise, his civil right of a jury trial, the right to a trial in the civil courts, and his rights to the protection of the laws of the land. Can the deprivation of liberty mean more than this, and yet, under the National Constitution, the State or its officials have no right to raise an army.

It is evident from a careful reading of the Act approved May 18, 1917 that Congress recognized the fact that it was doubtful whether under ordinary circumstances and conditions of the nation it had the authority to pass such an act. This is shown by the preamble which gives the reason for the passage of the act in which it says "that in view of the exist-

ing emergency," and there is also a repeated reference to the 'existing emergency' throughout the various sections of the act. But the fact remains that an "existing emergency," either real or fancied, is no reason for the passage of a law which in itself is unconstitutional. This theory has been set aside for all time under the decision of this Court in the case of Ex Parte Milligan, a case growing out of the conditions of the time when this country was facing the most serious 'emergency' that has developed durin our history, and in that case this Court said.

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."
> 4 Wall 2, 142.

An "emergency" may be the basis and excuse for the passage of a law by Congress, but never the basis or reason for a decision or opinion of this court. Exercise of a power enjoyed by Congress is permitted as is of course, but 'emergency' as a reason for its constitutionality, is utterly unsound. Congress or the Executive through one cause or another may not be able or willing to find and use constitutional means to cope with a supposed existing emergency, but that does not signify it is not there, it only signifies they have been unable to find one, or are unwilling to use one that is known. The people are the ultimate authority is such a case, and if an emergency in fact exists, which cannot be reached under the Constitu-

tion, it can be met under the power of the Amendment as provided by Article 5 of the Amendments to the Constitution. In the past we have met great domestic crises and upheavals, and foreign dangers from which the people, through Congressional action, apparently for the time being, were unable to find immediate Constitutional means of relief; however, when the courts have refused to sanction the unconstitutional means proposed, Congress has been able to meet the situation, when necessary, with means that were Constitutional. For over one hundred years we have found the Constitution ample to meet every emergency and today the present emergency can be met without any encroachment upon either letter or spirit of that instrument—our fundamental law, but the Act approved May 18, 1917 violates both.

In conclusion this Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations prescribed thereunder are null and void in that Congress has no power under the National Constitution to raise an army by conscription. This fact is emphasized by the fact of the hostile attitude of the people of England and the American Colonies, during the 18th century, toward a standing army; and by the further fact of limiting the authority of Congress over the most important military force of that time—the militia.

This Act being an attempt by the federal government to raise an army by conscription, is in violation of both the letter and spirit of the Constitution, in that it is an attempt to force the members of the militia into the national army by means other than that prescribed by that instrument. The rights of the

members of the militia to be officered and trained by the States, as granted them by the Constitution, are denied and overridden by the provisions of this Act. Furthermore, since none of the conditions under which Congress can call forth of the militia exist, the militia, both organized and unorganized, could not be called forth either by Congress or the President, even though the act provided for the proper method of doing so.

However, if Congress had the authority to raise an army by conscription, this right was lost by the adoption of the XIII Amendment to the Constitution which prohibits involuntary servitude except as a punishment for crime.

If by any possible interpretation of the Constitution, Congress has authority to raise an army by conscription, it is clear that that authority can not be delegated to the President or any other administrative officer of the United States or of the States, yet the Act in question, makes no provision for raising an army, but authorizes the President, in his discretion, to provide for raising whatever forces he desires and in the manner in which he wishes. We urge that such a delegation of power comes within the inhibition of the Constitution.

Furthermore, by the provisions of this Act, various state officials are required to engage in the raising of an army under the direction of the President, and for failure or refusal to obey the dictates of the President are liable to arrest and imprisonment. This plaintiff in error is drafted by state officials into the national army while the Constitution prohibits the raising of such an army by the States. Also this

compulsion upon officials of the States destroys the sovereignty of the States in that sphere where they are supreme and breaks down the integrity of republican principles in their government.

By this Act this plaintiff in error is to be deprived of his liberty and possibly of his life without due process of law, and, upon the whim of a state official or an appointee of a state official, ordered into the conscript army, but without the rights reserved to him, as a member of the militia, under the Constitution and the laws of the land.

For these reasons Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations of the President prescribed thereunder be declared null and void.

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